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No. ___

IN THE

Supreme Court of the United States

BLANCHE E. GREENLESS,
Petitioner,

v.

LINCOLN C. ALMOND, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the First Circuit United States Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

G. Kendrick Macdowell
Of Counsel

ANTONIO PONVERT III *
KOSKOFF, KOSKOFF
& BIEDER, PC
350 Fairfield Avenue,
5th Floor
Bridgeport, Connecticut 06604
(203) 336-4421

* Counsel of Record

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QUESTION PRESENTED

Does a court purporting to apply the "plain meaning" rule of statutory construction properly give effect to the will of Congress when its construction:

(a) assumes "clear and unambiguous" language where other courts have discerned ambiguity;

(b) partially repeals a statute by implication—thus destroying the valuable vested statutory rights of millions of Americans—where there is no reference in the text or legislative history of the latter enactment to the statute purportedly repealed, the rights embodied therein, or its former beneficiaries;

(c) rejects a plain interpretation that gives effect to both the earlier and later statutes, thus ignoring the cardinal obligation to harmonize statutes whenever possible;

(d) ignores the statutory context that confirms a more plausible legislative intent;

(e) renders all but the last sentence of the latter enactment superfluous;

(f) finds an implied repeal in an emergency appropriations rider—despite rules in both houses of Congress that forbid such substantive change of law in appropriations measures; and

(g) effects a massive taking of property without just compensation, though Congress never contemplated such a result, which raises serious constitutional problems that can easily be avoided with a harmonizing interpretation?

PARTIES TO PROCEEDING

The parties to the proceedings below were the petitioner Blanche E. Greenless, on behalf of herself and all others similarly situated, and the following respondents:

1. Defendant Lincoln C. Almond, in his official capacity as Governor of the State of Rhode Island.
2. Defendant Christine L. Ferguson, in her official capacity as Director of the Department of Human Services for the State of Rhode Island.
3. Defendant Sheldon Whitehouse, in his capacity as Attorney General for the State of Rhode Island.

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OPINIONS BELOW

The unreported decision of the United States District Court for the District of Rhode Island and the opinion of the First Circuit United States Court of Appeals, reported at 277 F.3d 601 (1st Cir. 2002), are set forth in the Appendix at App. 17a and App. 3a, respectively.

BASIS FOR JURISDICTION

The opinion of the First Circuit United States Court of Appeals was filed on January 28, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the United States Constitution Amendments V and XIV appear in the Appendix at App. 45a. In addition, the relevant portions of the Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57 (1999) (codified at 42 U.S.C. § 1396b(d)(3)) and of 42 U.S.C. § 1396k appear at App. 49a and 47a, respectively.

STATEMENT OF RELATED CASES

Currently pending before the Court are Petitions for Writs of Certiorari to the Second and Tenth Circuits. *See Tyler v. Douglas;* 280 F.3d 116 (2nd Cir.), *petition for cert. filed,* (U.S. April 19, 2002) (No. 01-1558); *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), *petition for cert. filed*, (U.S. April 5, 2002) (No. 01-1463). Both Petitions present essentially the same issue of statutory construction. However, the First Circuit opinion further aggravates the inconsistency of the decisions in these Medicaid enforcement cases.

STATEMENT OF THE CASE

This case derives from the lawsuits by the fifty states against tobacco companies to recoup the states' Medicaid expenditures. These historic lawsuits ultimately led to an

unprecedented settlement in which states stand to collect billions of dollars in perpetuity.

Federal Medicaid law provides that upon actual collection of any Medicaid recovery—for example, upon each future annual payment from tobacco companies—the state and federal governments are fully made whole for their Medicaid expenditures. The balance of the recovery, if any, goes to individual Medicaid recipients such as Petitioner here. 42 U.S.C. § 1396k(b).

This lawsuit is that simple. Yet is has spawned a bizarre jurisprudence. In the several states where Medicaid recipients have sued to enforce supreme federal Medicaid law (including Rhode Island, the origin of this lawsuit), nearly all courts have decided that Medicaid recipients lose, but their multiple paths to that result often contradict each other and this Court's authoritative direction. While district courts have nearly all dismissed these Medicaid enforcement cases on Eleventh Amendment sovereign immunity grounds, not a single one of the six federal courts of appeal to decide a Medicaid case has agreed. Two circuits expressly disagreed, holding correctly that the Eleventh Amendment did not bar this suit for prospective enforcement of supreme federal law. The other four circuits elected to bypass the Eleventh Amendment question and affirmed on different grounds.

Three federal courts of appeal—the First, Second, and Tenth Circuits—decided the case based upon an emergency appropriations rider enacted in 1999, in which Congress waived the federal share of the states' historic Medicaid recovery. *See* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57, 103-04 (1999), codified at 42 U.S.C. § 1396b(d)(3) (App. at 50a). These courts inflated that express waiver of the *federal* share into an implied repeal of *Medicaid recipients'* statutory entitlement to the remainder under 42 U.S.C. § 1396k(b).

This Petition seeks review of this remarkable departure from established canons of statutory construction.

A. The Medicaid Program

"The Medicaid program provides federal funds to States that pay for medical treatment for the poor." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981). It is "a cooperative federal-state program through which the Federal Government provides financial assistance to the states so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 502 (1990).

"Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [the Medicaid Act]." *Harris v. McRae,* 448 U.S. 297, 301 (1980); *see also Wilder*, 496 U.S. at 501. Rhode Island has chosen to participate in the Medicaid program. Rhode Island's program of medical assistance to low-income persons is codified at Rhode Island General Laws §§ 40-8-1 *et seq.*, wherein the State commits to administer its Medicaid program with the requirements of the Medicaid Act.

Among the provisions of the Medicaid Act, to which Rhode Island expressly subscribed in exchange for hundreds of millions of dollars of federal assistance, is mandatory recovery, where practicable, of Medicaid expenditures for which third parties are responsible. 42 U.S.C. § 1396a(a)(25). Such a recovery must then be distributed in the following order: (1) to the state, for its Medicaid expenditures; (2) to the federal government, for its contributed expenditures; and (3) to the injured Medicaid recipients on whose behalf the expenditures were made. 42 U.S.C. § 1396k(b) (App. at 48a); *see also* 42 C.F.R. § 433.154 (same); 45 Fed. Reg. 8983 (1980) (HCFA's official commentary). This distribution requirement ensures that both

the state and federal government are made whole, with the balance of a recovery, if any, going to the injured party.

B. Rhode Island's Medicaid Recovery: The Tobacco Settlement

This case arises following Rhode Island's resolution of its lawsuit against manufacturers of tobacco products, brought in June 1997 by the State of Rhode Island against the tobacco industry. Prominent in Rhode Island's lawsuit, as with the tobacco lawsuits of all states, were claims of Medicaid expenditures caused by tobacco products.

The case settled on December 17, 1998 pursuant to a Consent Decree and Final Judgment. Rhode Island then became eligible to participate in a Master Settlement Agreement ("MSA") crafted by the tobacco industry and the Attorneys General of 46 settling states. In the MSA, the states agreed to "unconditionally release and forever discharge" the tobacco defendants from "any future claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products." MSA at 8, 55. In exchange for this release, the states, including Rhode Island, became eligible to collect from the tobacco defendants future anticipated annual payments in a total amount then estimated at $206 billion. The complaint in this case pleads, and the evidence submitted to the district court confirms, that Rhode Island's settlement collections will substantially exceed its actual smoking-related Medicaid expenditures.

Significantly, before these Medicaid enforcement lawsuits, there was no material controversy over the straightforward proposition that the tobacco settlement constituted a Medicaid recovery. Indeed, until the pot got massive, states themselves behaved in conformity to § 1396k(b)'s mandatory distribution scheme. In testimony before Congress, the Deputy Administrator of the Health Care

Financing Administration ("HCFA," then the name of the agency responsible for administering the Medicaid program), stated:

> Existing Federal law clearly requires States to share all Medicaid recoveries with Federal taxpayers. **Nothing in the law creates an exception for tobacco settlements, regardless of their size.** States routinely report and credit HCFA with the Federal share of third party liability collections. It is worth highlighting that three States—Massachusetts, Louisiana, and Florida—reported and credited to HCFA some of their tobacco collections as part of a settlement with the Liggett Corporation. Although the funds involved in the Liggett settlement are much smaller than those at stake in the comprehensive settlement, these initial payments indicate that **the States understand their legal and fiduciary responsibility to credit the Federal government with its share of tobacco settlement proceeds.**

Medicaid and Tobacco Settlements, 1999: Before Subcommittee on Labor, HHS, Education, and Related Agencies of the Senate Comm. on Appropriations, March 15, 1999, (Statement of Mike Hash, Deputy Administrator, Health Care Financing Administration) (emphasis added).

C. This Lawsuit for Prospective Enforcement of 42 U.S.C. § 1396k(b).

Petitioner Blanche E. Greenless filed suit on behalf of herself and all others similarly situated in the United States District Court for the District of Rhode Island on January 26, 2000. Defendants Almond, Ferguson and Whitehouse filed a motion to dismiss on March 15, 2000, claiming that Eleventh Amendment sovereign immunity barred Petitioner's claims. The trial court agreed and granted the motion to dismiss by

order dated February 26, 2001. On January 28, 2002, the First Circuit affirmed.

The First Circuit panel, however, elected to bypass the Eleventh Amendment question. The panel instead decided that Congress' 1999 emergency appropriations rider (App. at 13a-16a)—an amendment to a separate section of the Medicaid Act concerning only calculation of money due the federal government—implicitly repealed § 1396k(b) and thus *sub silentio* stripped Medicaid recipients of substantial vested rights. Neither the text of the 1999 appropriations rider nor its legislative history makes any reference to § 1396k(b) or to the rights of Medicaid recipients embodied therein.

REASONS FOR GRANTING THE WRIT

This case frames a pure issue of statutory construction with implications for how every judge in every district and appellate court interprets legislation. Petitioner respectfully contends that the error in the First, Second, and Tenth Circuits bespeaks a fundamental misunderstanding of the weight and interrelation of core canons of statutory construction.

The First Circuit concluded that the final sentence of Congress' 1999 appropriations rider—permitting the states to "use the sums described in clause (i) for any expenditures determined appropriate by the State"—means that the states could spend the *entire* tobacco settlement in any manner they pleased, and that Congress thus not only gifted billions of *federal* dollars to the states but likewise by stealth stripped Medicaid recipients of their vested statutory rights.

Yet the text of the appropriations rider does not say that. Nor could its *context* cue any conclusion other than the opposite one. And the rider's legislative history confirms the error. The members of Congress debated only what to do

with the *federal* share of the states' Medicaid recovery. The members of Congress then located their enactment in a section of the Medicaid Act addressing only money to which the *federal government* would have been entitled. And they did so with an emergency appropriations rider—the kind of enactment *least* suited to affect substantive change in law (which is why rules in both houses of Congress forbid it). Never once did any member of Congress ever mention or even imply any intention to affect Medicaid recipients' rights.

At stake here is not only a massive confiscation of property from the nation's poorest citizens,[1] or merely a mistaken interpretation of a single statute—but the basis upon which the judiciary lays claim to principled and consistent decision-making. The danger in the circuit decisions is an unprecedented departure from the rules that discipline judges in "giving effect to the will of the Legislature." *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738, 866 (1824). The published opinions to date—and more Medicaid enforcement cases are currently under consideration[2]—imperil the utility and integrity of the canons of construction.

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1 Medicaid, as "the payor of last resort," requires citizens to spend down their assets to meet eligibility levels. *See* 42 U.S.C. 1396a(a); S.Rep. No. 99-146 at 312, reprinted in 1986 U.S. Code Cong. & Ad. News, vol. 3A, 279 ("Medicaid is intended to be the payor of last resort, that is, other available resources must be used before Medicaid pays.").

2 The following cases are currently pending decisions by the Fourth, Sixth, Ninth and Tenth Circuits: *White v. Hunt*, No. 01-2245 (4th Cir.); *Strawser v. Lawton*, No. 01-1175 (4th Cir.); *Joseph v. Condon*, No. 01-1557 (4th Cir.); *Barton v. Summers*, No. 00-5942 (6th Cir.); *Downs v. Commonwealth of Kentucky*, No. 00-6282 (6th Cir.); *Anderson v. Crawford*, No. 01-15986 (9th Cir.); and *Cardenas v. Anzai*, No. 01-15297 (9th Cir.). In addition, in *Broselow v. Fisher*, No. 01-3933 (3rd Cir.), briefing is complete and oral argument is scheduled to be heard by the Third Circuit in June 2002.

On this record, the core canons of statutory construction have little power to cabin judicial discretion.

Indeed, to the eight well-settled canons of statutory construction set forth in the following Supreme Court cases, the First Circuit decision below, as well as the decisions from the Second and Tenth Circuits, essentially add, "**or not.**"

- **"[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."** *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotations omitted). The two statutory provisions at issue are clearly capable of co-existence—in § 1396k(b), Congress mandated a specific distribution scheme for Medicaid recoveries; in the 1999 appropriations rider, Congress declared that the states were free to use *the federal share* of the tobacco settlement however they wish.

- **"[T]he meaning of statutory language, plain or not, depends on context."** *Bailey v. United States*, 516 U.S. 137, 145 (1995). The statutory context of the 1999 amendment confirms Congress' intent only to waive the federal share of the tobacco settlement, not to affect Medicaid recipients' rights.

- **"[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."** *United States v. Fausto*, 484 U.S. 439, 453 (1988). Neither the text nor legislative history of the 1999 appropriations rider even hints at any intention to affect § 1396k(b) or the rights of Medicaid recipients.

- **"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and**

manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (implied repeals would require "positive repugnancy between the provisions"); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). Congress did not even hint at intent to repeal § 1396k(b), much less make it clear and manifest or enact a "positive repugnancy."

- **"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"** *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The decision below renders superfluous all of the 1999 amendment except the final sentence.

- **The doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act."** *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The 1999 amendment was an emergency appropriations rider—a legislative vehicle that, by rules in both houses of Congress, cannot affect substantive change in law.

- **"Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively."** *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Martin v. Hadix*, 527 U.S. 343 (1999)).

The circuit court's interpretation operates retroactively to strip Medicaid recipients of substantial vested rights, though Congress never hinted at any intention to affect Medicaid recipients *at all*, much less directed such a confiscation with "the requisite clarity."

- **Statutes must be interpreted to avoid not merely unconstitutional results, but "difficult constitutional questions," and where, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems."** *St. Cyr*, 533 U.S. at 300 & n.13. According to the circuit court's interpretation, Congress retroactively confiscated Medicaid recipients' statutorily vested property interest in the tobacco settlement remainder—which assuredly raises a "difficult constitutional question," despite a logical and persuasive interpretation that avoids constitutional difficulty.

The "plain meaning" doctrine is a powerful force that disciplines judiciary and legislature alike—but like all rules of statutory construction, its power must be exercised responsibly and always in the service of discerning actual legislative intent. This Court's recent unanimous disposition in *Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230 (2002)—reversing the en banc Ninth Circuit—is illustrative. The en banc Ninth Circuit contrived an inventory of improper canons to subvert plain statutory meaning and clear congressional intent. Here, the First Circuit declared the meaning "plain" though it plainly is not, and could thus disregard numerous well-settled canons of construction that confirmed a different meaning. True legislative intent—the point—is subverted in both approaches. This case is a vehicle for the Court to convey that message forcefully.

This case provides an ideal complement to the principles forcefully enunciated in *Rucker*. Where *Rucker* illustrates the proper use of the plain meaning doctrine, this case illustrates its misuse.

If, as Petitioner respectfully contends, the First, Second, and Tenth Circuits erred, then the very magnitude of that error, in a case affecting millions of Americans immediately, and countless more in future judicial dispositions, warrants this Court's intervention to correct it. If, as Respondents will contend, the circuit decisions are correct in result, then this Court's explanation of a principled basis for that result can have enormous consequences for how judges and litigants comprehend and apply the tools of statutory construction.

ARGUMENT

I. The Current Medicaid Enforcement Landscape

Numerous district courts and six federal courts of appeal, including the First Circuit, have decided similar cases on a variety of often contradictory grounds. Decisions to date are nearly all adverse to Medicaid recipients—yet that "momentum" is so fragmented and so fraught with conflict and disagreement that the ease with which most courts have apparently decided the result very much belies the struggle to find a principled basis for that result.

The first—and perhaps most influential—Medicaid enforcement disposition in federal court was *Floyd v. Thompson*, 111 F.Supp.2d 1097 (W.D. Wis. 1999), *aff'd on other grounds*, 227 F.3d 1027 (7th Cir. 2000). The court dismissed the case by declaring that the tobacco settlement proceeds were "fixed" and had already "vested" in the state, rendering the case one for retrospective "damages" and thus barred by the Eleventh Amendment—a conclusion both factually wrong and legally irrelevant to the proper *Ex parte Young* analysis.

While six United States Courts of Appeals have now issued decisions on versions of these Medicaid enforcement actions, not a single one embraced the Wisconsin court's conclusion (including the Seventh Circuit on appeal), and the Tenth Circuit expressly repudiated it. Indeed, not a single federal appellate court has yet held that the Eleventh Amendment bars a Medicaid enforcement action—and two (the Fifth and Tenth Circuits) have correctly held that it does not. But the Wisconsin court's analytical error spread rapidly through other district courts, and at least **eleven** such courts reproduced the Wisconsin court's fallacious reasoning in dismissing these cases on Eleventh Amendment grounds.[3]

The first federal appellate court to decide a Medicaid case was the Seventh Circuit in *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000). Concluding that the Eleventh Amendment questions were "complex" and "not easily answered," *id.* at 1034-35, the Seventh Circuit skipped them and proceeded to the merits. As to Congress' 1999 appropriations rider—now the most common basis for adverse decisions in appellate courts and the basis for this Petition—the Seventh Circuit simply discerned ambiguity: maybe Congress agreed with the states or maybe Congress was just "feeling generous." *Id.* at 1034.

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[3] *See Barton v. Summers*, 111 F.Supp.2d 989, 992 (M.D.Tenn. 2000); *White v. Hunt*, 2000 WL 33261006, *5, No. 00-CV-14 (W.D.N.C. Jul. 12, 2000); *McClendon v. Georgia Dep't of Community Health*, No. 4:00-CV-0026-HLM, slip op. at 17 (N.D.Ga. Aug. 28, 2000); *Downs v. Kentucky*, No. 00-23, slip op. at 7 (E.D.Ky. Aug. 31, 2000); *Martin v. New Mexico*, 197 F.R.D. 694, 696 (D.N.M. 2000); *Strawser v. Lawton*, 126 F.Supp.2d 994, 1003 n.6 (S.D.W.Va. 2001); *Cardenas v. Anzai*, 128 F.Supp.2d 704, 709 (D.Haw. 2001); *Greenless v. Almond*, No. 00-037ML, slip op. at 6 (D.R.I. Feb. 26, 2001); *Rickerts v. Guinn*, No. CV-N-00-0176-HDM, slip op. at 4 (D.Nev. Feb. 27, 2001); *Clark v. Stovall*, 158 F.Supp.2d 1215, 1224 (D.Kan. 2001); *Joseph v. Condon*, No. 6:00-324-24, slip op. at 11 (D.S.C. Mar. 19, 2001).

Thus, the Seventh Circuit acknowledged ambiguity in precisely the words that the First Circuit below deemed unambiguously "plain" and "clear," App. at 14a, 16a—which is to say that the very word "unambiguous" now assumes an ironic ambiguity. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts).

On narrow grounds of Wisconsin assignment law, the Seventh Circuit held that § 1396k(b) did not come into play because there was not (and, logically extending this holding, never could or ever will be under any circumstances) a "remainder" to which Medicaid recipients could be entitled. If, as the Seventh Circuit found, the "assignment [to the state by Medicaid recipients] corresponds exactly to the amounts the state pays," *Floyd*, 227 F.3d at 1037, then 42 U.S.C. § 1396k(b) is a nullity, never triggered, and so much statutory surplusage—because any conceivable remainder has been defined out of existence by the artifice of declaring that the state collects "under an assignment" exactly what it spends.

The Fifth Circuit then decided *Watson v. State of Texas*, 261 F.3d 436 (5th Cir. 2001), a Medicaid enforcement action with a somewhat different procedural posture. Confronting the Eleventh Amendment head on—but not addressing *Ex parte Young*—the Fifth Circuit concluded simply that the State of Texas had waived its sovereign immunity in the Master Settlement Agreement as to matters of enforcing that Agreement, and that the instant case was such a case of enforcement.

As to Congress' 1999 appropriations rider, the Fifth Circuit held exactly as the entire text, its context and legislative history compel: "The Federal Government has waived any claim it may have to reimbursements." *Id.* at 443 (citing 42

U.S.C. § 1396b(d)(3)(B)(i)). Nothing more, nothing less. The First and Second Circuit's "clear and unambiguous" *opposite* meaning had yet to become plain.

The Fifth Circuit then proceeded to its version of the merits, and concluded that Texas proceeded "directly" against tobacco companies, rather than through subrogation or assignment, and that the absence of state claims "under an assignment" accordingly failed to trigger § 1396k(b). *Id.* at 444. Thus, while the Seventh Circuit's disposition essentially reads § 1396k(b) out of the statute books, the Fifth Circuit's disposition permits a state to accomplish that remarkable result at its pleading discretion (*viz.*, by proceeding "directly" against a third-party tortfeasor, rather than "under an assignment").

Ten days after the Fifth Circuit's disposition, the Eleventh Circuit decided *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252 (11th Cir. 2001). Doubling back to the Seventh Circuit's approach, and likewise finding the *Ex parte Young* issues "much thornier," *id.* at 1259, the Eleventh Circuit skipped to the merits, and concluded that Georgia only collected under the statutory assignment "what it actually spent on medical assistance." *Id.* at 1261. Again, the deceptively elegant appearance of this disposition (assignment equals collection) belies what is in fact a complete evisceration of § 1396k(b)—or that portion of it that benefits Medicaid recipients. In the Seventh and Eleventh Circuits, the phrase, "and the remainder of such amount collected shall be paid to such individual," has disappeared from the United States Code, there no longer being any possibility of such a "remainder."

The Tenth Circuit weighed in next with yet a fourth approach to the issues. In *Harris v. Owens*, 264 F.3d 1282 (10th Cir.), *petition for cert. filed* (U.S. April 5, 2002) (No. 01-1463), the court first concluded that it was obliged to

resolve the Eleventh Amendment issue. "Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a plaintiff's claim on the merits." *Id.* at 1288.

Thereupon, the Tenth Circuit finally addressed and authoritatively dispatched the mischief wrought by the Wisconsin district court in *Floyd*. "From a purely economic perspective, it may be irrelevant that the settlement funds are to be paid over time rather than all at once; the future amount can be reduced to present value. For the purposes of the Eleventh Amendment, however, the difference is highly relevant." *Id.* at 1291-92. Concluding that the state's decision to keep the entire tobacco windfall "may constitute an ongoing violation of federal law," and that the plaintiff sought only "prospective" relief with respect to future collections, the Tenth Circuit concluded that *Ex parte Young* operated to avoid the Eleventh Amendment bar. The court only then turned to the merits. For multiple reasons discussed hereunder, the Tenth Circuit erred in concluding that Congress' 1999 appropriations rider *sub silentio* stripped Medicaid recipients of their vested statutory rights under § 1396k(b).

A month later, the Second Circuit decided *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir.), *petition for cert. filed* (U.S. April 19, 2002) (No. 01-1558). And on January 28, 2002, the First Circuit decided *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002). Those Courts skipped the Eleventh Amendment question, and proceeded directly to Congress' 1999 amendment. Whereas the Seventh Circuit simply saw ambiguity and the Fifth Circuit simply saw a federal waiver, the First and Second Circuits found "clear and unambiguous" evidence that Congress had quietly and retroactively stripped millions of Medicaid recipients of their

vested statutory rights under section 1396k(b). App. 13a-16a.

The district and circuit courts require guidance.

II. Congress' 1999 Emergency Appropriations Rider Does Not Even Reference, Much Less Repeal, Section 1396k(b) or the Vested Rights Embodied Therein.

After intense lobbying by the States to prevent the federal government from claiming its share of the tobacco settlement as a Medicaid recovery, Congress included a rider to the Emergency Supplemental Appropriations Act of 1999 providing that HCFA would not treat tobacco settlement funds as an overpayment to the States for the purpose of offsetting future federal Medicaid matching funds. In other words, the federal government waived its claim to its share of the tobacco settlement.

The full text of the 1999 emergency appropriations rider is set forth in the Appendix at 49a. Subsection **(A)** expressly refers to the "share to which the United States is equitably entitled." Subsection **(B)(i)** then says simply that this federal "share" shall not apply to the tobacco settlement. Subsection **(B)(ii)** then says that States may "use the sums described in clause (i) [*i.e.*, the federal share of the tobacco settlement] for any expenditures determined appropriate by the State."

The First, Second, and Tenth Circuits have now concluded—based solely upon the last sentence of the appropriations rider—that rather than simply waiving the federal government's rights to its share of the tobacco settlement, which is all Congress ever debated, the rider somehow lurched into distant sections of federal Medicaid law, *sub silentio* repealed § 1396k(b)—a section of the Medicaid Act **50 pages away** in the United States Code[4]—and

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[4] The First Circuit described Congress' 1999 appropriations rider as having "amended the statute"—meaning, presumably, the Social

retroactively stripped Medicaid recipients of substantial vested rights without ever mentioning § 1396k(b) or Medicaid recipients. Such an interpretation bears neither logical nor constitutional scrutiny.

A. The Text and Context of the 1999 Appropriations Rider Demonstrate Plainly That Congress Waived Only the Federal Government's Share of the Tobacco Settlement.

Congress expressly understood the tobacco settlement to be a Medicaid recovery, subject to supreme federal Medicaid law—and then chose to treat the tobacco settlement proceeds in the section of federal Medicaid law dealing with how the federal government calculates annual Medicaid payments it will make to states. The straightforward text and context of the 1999 appropriations rider confirms that it concerns *only* the portion of the tobacco settlement to which the federal government would have been entitled.

Congress targeted one, and only one section of federal Medicaid law—the section previously enumerated 1396b(d)(3), which it renumbered 1396b(d)(3)**(A)** in 1999, and to which it added subsection **B**—thus expressly addressing only the "share to which the United States is equitably entitled." *See* 42 U.S.C. § 1396b(d)(3).[5]

Security Act. *See Greenless*, 277 F.3d at 604. Congress never even mentioned, much less amended, § 1396k(b), which is precisely the controversy. Yet the First Circuit's careless phrasing erroneously suggests that Congress deliberately "amended the statute" at issue in this lawsuit.

[5] By definition, of course, and as discussed in greater detail *infra*, appropriations measures concern *only* money going into or coming out of the federal government. They do not, and generally *cannot*, affect substantive statutory provisions, much less effect a massive confiscation of property belonging to private citizens.

Conspicuous as well is what Congress did *not* do—amend or repeal or even mention § 1396k(b)—which it easily could have done and would have been obliged to do if it intended such a radical divestiture of statutory property rights. Though "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States v. Fausto*, 484 U.S. 439, 453 (1988), the 1999 appropriations rider never mentions section 1396k(b), never mentions Medicaid recipients, and never mentions any intent to repeal or affect any other portion of federal Medicaid law.

The title of the appropriations rider[6] reinforces the specific and limited scope of Congress' concern: "PROHIBITION ON TREATING ANY FUNDS RECOVERED FROM TOBACCO COMPANIES AS AN **OVERPAYMENT** FOR THE PURPOSES OF MEDICAID." *See Conference Report on 1999 Emergency Supplemental Appropriations Act*, 145 Cong. Rec. H3175, 3200 (emphasis added). The technical term "overpayment" applies specifically and exclusively to funds to which the federal government would otherwise be entitled.[7]

The First Circuit effectively treated the last sentence of the appropriations rider as an independent statute, divorced from

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[6] While not a dispositive feature of statutory construction, the title of an enactment may certainly point the way—especially where, as here, the title specifically signals the scope of the enactment, and no other textual evidence points *specifically* to a different or larger scope. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen v. Baltimore & Ohio RR. Co.*, 331 U.S. 519, 528-529 (1947)).

[7] This meaning of the term "overpayment" is expressly set forth in the statute itself, at § 1396b(d)(3)(A), which existed before the 1999 rider and was merely renumbered to add "(A)."

context and legislative history. Yet this Court has repeatedly emphasized that **text**—even assertedly "unambiguous" text—depends upon **context**. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of statutory text "but also its placement and purpose in the statutory scheme."); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

Moreover, the First Circuit's treatment of subsection (B)(ii) as an independent repeal of substantive Medicaid law renders the 1999 appropriations rider bizarre. If Congress had truly intended to say that states were free to spend all of the tobacco settlement proceeds in whatever manner they pleased, notwithstanding the § 1396k(b) distribution rules or any other provision of federal law, then Congress could have enacted a statute that simply **said that**. Congress need never have concerned itself with the technical subject of "overpayments." If states can spend all of the money however they please, then *a fortiori* none of the tobacco settlement proceeds constitute "overpayments" or are otherwise subject to any federal equitable entitlement. In other words, the First Circuit interpretation renders superfluous every word in the 1999 appropriations rider except for clause (B)(ii). There would have been no need for clause (B)(i) if indeed Congress intended to liberate the states to spend all of the tobacco settlement proceeds however they please, notwithstanding any contrary provision of federal law.

This Court recently reiterated the critical canon of statutory construction that forbids exactly what the First Circuit (as well as the Tenth and Second Circuits) did. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122

S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The question then naturally arises: why did Congress include language in subsection(B)(ii) that appears to free the states from constraint in spending tobacco settlement proceeds (or more precisely, the federal share of the tobacco settlement proceeds)? The answer, as the next section makes abundantly clear, is that the debate in Congress at the time of the 1999 enactment was on whether to give **the federal share** to the states without conditioning its use, or whether to give **the federal share** to states **with the stipulation that they must spend some or all of the federal share on specified health programs**. Those favoring conditions on the federal share lost. The rider ultimately enacted made clear that the federal government would not dictate how states must spend **the federal share**, despite the federal government's "equitable entitlement" to a substantial part of the tobacco settlement.

B. The Legislative History of the 1999 Appropriations Rider Unambiguously Confirms That Congress Addressed Only the Federal Share of the Tobacco Settlement.

The Senators debating the federal treatment of the tobacco settlement divided roughly into two camps: one that wanted to let the states keep the federal government share and spend it however they wish; and another that wanted to let the states keep the federal government share, but make them spend it (or a portion of it) on salutary health programs.

Typical of the camp opposing the rider that was ultimately enacted, and instead favoring conditions on spending the federal share of the tobacco settlement, was this statement by Senator Kennedy:

> States are free to use **the state share** of their recoveries in any way they choose. However, Congress has a clear and compelling interest in how **the federal share** will be used.

145 Cong. Rec. S2889-S2890 (March 18, 1999) (statement of Sen. Kennedy). Congress' focus *only* on **the federal share**—and the debate over whether the federal government would dictate how the States must spend **the federal share**—could hardly be more plain.

Senator Harkin, who sponsored a competing amendment, likewise hammered the central theme of the debate: whether Congress should impose spending conditions on **the federal share** of the tobacco settlement:

> I don't want to tell the States what to do with their money, but when the Federal taxpayers provide over 50 percent of Medicaid monies to the States and we are paying 50 billion bucks a year in health-related costs and much of that through Medicaid, then I think **we have a right and an obligation to say that some portion of that money that is Federal money** ought to go for health-related purposes.

145 Cong. Rec. S2886 (March 18, 1999) (statement of Sen. Harkin).

The ultimately enacted appropriations rider merely confirmed who won that debate: States would not be told by Washington how to spend **the federal share** of the tobacco settlement, despite the federal government's acknowledged claim to a substantial percentage of the states' Medicaid recovery. Instead, States could use that money—that is, the **federal share** specifically under consideration—"for any expenditures determined appropriate by the State." 42 U.S.C. § 1396b(d)(3)(B)(ii).

Most telling, the Conference Report concerning the appropriations rider expressly declares the subject of the enactment to be "**the Federal share of funds** recovered under [tobacco] settlements or judgments." Conference Report on 1999 Emergency Supplemental Appropriations Act, 145 Cong. Rec. H3175, 3200 (emphasis added).[8]

Senator Hutchison herself, the rider's chief sponsor, stated that the federal government planned to "seize $18.9 billion of the State tobacco settlement funds **for Medicaid recoupment**." 145 Cong. Rec. S1145, 1157 (emphasis added). Similarly, in introducing the rider, Senator Gorton from Washington (a co-sponsor) described it thus: "I join my Senate colleagues in introducing this legislation to prohibit **the federal government from trying to recoup any funds** from state governments recovered from tobacco companies as part of their tobacco settlement **or from determining how these funds should be spent.**" *Id.* at 1159 (emphasis added). Senator Leahy from Vermont (a co-sponsor) similarly described the rider as "legislation to prohibit the **Federal government from recouping** any part of the [tobacco] settlement"). *Id.* at 1161 (emphasis added). Senator Levin from Michigan (another co-sponsor) stated: "I will support an amendment to this bill which will keep in the states any so called **'federal share' funds**"). 145 Cong. Rec. S2342 (emphasis added).

Additionally, every one of the letters submitted to Senator Hutchison by state and local entities in support of the rider

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[8] *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

makes clear that the purpose of the rider, and the sole motivation for the intensive lobbying effort behind the rider, was to prevent recoupment of **the federal share** of the tobacco settlement, and that no part of the debate pertained to the Medicaid recipients' share.[9]

What is "plain," upon examination of the rider's text in its context, as amply reinforced by the legislative history, is that Congress treated **the federal share** of the tobacco settlement—nothing more, nothing less. The total silence of Congress with respect to § 1396k(b) and Medicaid recipients simply cannot yield a conclusion that Congress nevertheless stripped their substantive and vested rights in a sentence clearly rooted in the rights of the federal government vis-à-vis the states. As once observed by Chief Justice Rehnquist and appropriate here, "[i]n a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (internal quotations omitted) (quoted in *St. Cyr*, 533 U.S. at 320 n.44. Only judicial usurpation of a legislative function would now read § 1396k(b) out of the law by stealth.

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[9] *See, e.g.*, letter from National Governors Association ("A major priority for the nation's Governors during the 106th Congress is ensuring that state tobacco settlement funds are protected from unwarranted **seizure by the federal government**"); letter from National Association of Attorneys General (supporting the rider because it protects "the state tobacco settlements from **seizure by the federal government**"); letter from the National Association of Counties (referencing **"federal recoupment"** and **"the federal government's claim"**); letter from the National League of Cities (supporting the rider because it "would prevent the **federal government** from taking a portion of state tobacco revenues"). 145 Cong. Rec. S1145, 1157-58.

C. Congress' 1999 Rider Could Not Have Properly Repealed Section 1396k(b) by Implication—Which Applies With Even Greater Force in an Appropriations Measure.

Whether reasonable minds may differ as to the meaning of the statutory text at issue, three observations about the 1999 appropriations rider are indisputable: (1) neither its text nor the legislative history ever mentions § 1396k or Medicaid recipients, much less discloses express intent to repeal that independent law or affect the rights of Medicaid recipients in any way; (2) the 1999 rider was an *appropriations* measure, to which specific rules and limitations apply in the task of interpretation; and (3) Petitioner's interpretation of the 1999 appropriations rider, as amply supported by textual cues and legislative history, is *at least* a plausible interpretation that harmonizes all relevant parts of federal Medicaid law. Taken together, these propositions yield a single conclusion consistent with controlling precedent: Congress did not strip Medicaid recipients of their section 1396k rights.

"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987)) (citations and internal quotation marks omitted). "In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *accord United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982). There is clearly no "positive repugnancy between the provisions" of section 1396k(b) and section 1396b(d)(3), as would be required for a finding of a legislative intent to

repeal Section 1396k. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).[10]

Section 1396b(d)(3) and section 1396k(b) *can* be read in harmony, and therefore *must* be read in harmony. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Section 1396b(d)(3) prohibits the reduction of future federal Medicaid payments to states based upon tobacco settlement proceeds, and then (a) imposes no specific restrictions on the states' ability to spend that *federal* portion of the settlement, and, stated differently, (b) imposes no specific restrictions on the states' ability to spend *their legal portion* of the settlement amount. Section 1396k(b) provides that any portion of the settlement amount that exceeds the state and federal government's Medicaid costs, and that is therefore neither the "federal" portion nor the states' "legal portion" of the settlement amount, shall go to the injured Medicaid recipients.

Any decision interpreting Congress' 1999 appropriations rider as anything other than a waiver of the federal government's share of the tobacco settlement proceeds creates a new and unprecedented principle of interpreting, and erasing, legislative enactments, and arrogates to the judiciary a function assigned to Congress by the most fundamental principles of our federalist form of government.

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[10] Technically, the First, Second, and Tenth Circuit constructions of the 1999 rider constitute a "partial" implied repeal of section 1396k(b), as only rights with respect to the tobacco settlement are purportedly affected. The difference is irrelevant. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.").

See Rotec Industries, Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1258 (Fed. Cir. 2000).

To the rigorous presumption against implied repeal, this Court has added an even more forceful condemnation of implied repeals in **appropriations** measures. *See especially TVA*, 437 U.S. at 190 (doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act"). In *TVA v. Hill*, this Court emphasized the significant practical danger of reading too much about substantive law into appropriations measures, upon which Congress itself has fastened strict limitations on scope. *Id.* at 190-91 (citing House Rule XXI(2) and Standing Rules of the Senate 16.4)

One authority described the critical federalist underpinning of this principle as follows:

> A doctrine that valuably distinguishes the judicial and legislative roles is the principle that federal courts do not assume that Congress uses one statute to implicitly repeal an earlier one. ... Repeal in an appropriations statute, in particular, is an acceptable conclusion only if Congress expressly relates the appropriations proviso to a previous law. The appropriations language must leave no doubt about legislative intent, like stating that no funds may be available to implement a previously authorized purpose, "notwithstanding" stated portions of the law identified in the appropriations bill.

L. Fisher, Statutory Construction: Keeping a Respectful Eye on Congress, 53 SMU L. Rev. 49, 61 (Winter 2000) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *accord Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Nothing in the 1999 appropriations rider even

remotely satisfies these conditions for implied repeal in an appropriations measure.

Any determination that Congress' rider to the 1999 Emergency Supplemental Appropriations Act somehow repealed the disbursement requirements contained in section 1396k(b) would (1) erroneously disregard the rigorous presumption against repeals by implication, *and then* (2) erroneously assume "that Congress meant to repeal *pro tanto* § [1396k(b)] of the [Medicaid] Act by means of a procedure expressly prohibited under the rules of Congress," *TVA*, 437 U.S. at 191, *and then* (3) erroneously insist that Congress did this remarkable deed without ever even mentioning § 1396k(b) or the rights embodied therein.

Strangely, the First Circuit panel conceded the foregoing strictures on implied repeals in appropriations measures, *see Greenless*, 277 F.3d at 608-09, but then hopelessly muddled the analytical framework by concluding, without citation to any authority, that "[t]hese concerns have less force where, as here, Congress was responding to a recent event, the Master Settlement Agreement, and was plain in its language." *Id.* at 609. It is unclear how or why "responding to a recent event" influences any relevant canon of statutory construction. Courts and litigants must now contend with a competing "temporality" canon in divining legislative intent.

This case, perhaps even more than *TVA v. Hill*—which the First Circuit declines to cite and with which it irreconcilably conflicts—demands application of the principle that appropriations measures cannot repeal substantive law located fifty pages away in the United States Code without any hint of intention to do so.

D. Interpreting Congress' 1999 Appropriations Rider to Destroy Medicaid Recipients' Vested Remainder Rights Poses Serious Constitutional Problems and Must Therefore Be Avoided.

Under the law that existed when the MSA was executed (and, Petitioner contends, still exists), Petitioner and others similarly situated acquired a § 1396k(b) right to the remainder of the state's Medicaid recovery. Thereafter, Congress enacted § 1396b(d)(3). According to the First Circuit, Petitioner thereupon lost that extraordinarily valuable property right—though Congress never mentioned any intent to affect Medicaid recipients at all, much less extinguish their entitlement to future proceeds of an executed settlement.[11] Such a result impermissibly operates retroactively *and* works an unconstitutional taking—infirmities easily avoided by doing what this Court commands in the first instance: harmonizing two statutes where that is fairly possible.

"A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (internal quotations omitted). Assuming only *arguendo* that Congress had the power even

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[11] There can be no dispute that the § 1396k(b) remainder interest is a protected property interest. Among other indicia, state law routinely recognizes the competing property interests in recoveries by Medicaid recipients. *See, e.g., Roberts v. Total Health Care*, 349 Md. 499, 513, 709 A.2d 142, 148 (1998) ("To the extent the settlement proceeds were intended to compensate for medical care they were not the property of the [Medicaid] recipients."). Here, Congress adds its express imprimatur through § 1396k(b).

expressly to repeal the disbursement provisions of § 1396k for purposes of the tobacco settlement,[12] it did no such thing.

"[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id.* at 316 (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The most rudimentary threshold for such "clarity" would require, at a minimum, express identification of (a) the specific right to be stripped; and (b) the class of people whose substantive rights are to be stripped. Congress identified neither. Indeed, this Court has observed that cases where it "has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

The First Circuit declined even to consider any of the foregoing commands, opting instead to rest entirely on its conclusory assertion of plain meaning: "[w]hatever the proper characterization of the relief Greenless seeks in this case, Congress made its intent clear in the amendment, which 'applies to all funds received under the Master Settlement Agreement, whether past, present, or future.'" *Greenless*, 277 F.3d at 609 (quoting *Harris*, 264 F.3d at 1296). A more dramatic illustration of the mischief of overreaching "plain meaning" is difficult to imagine.

Finally, as this Court recently emphasized, statutes must be interpreted to avoid *not* merely unconstitutional results, but "difficult constitutional questions." *St. Cyr*, 533 U.S. at 300 & n.13. Where, as clearly here, "an alternative interpretation

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[12] For purposes of assessing the constitutionality of confiscating Petitioner's § 1396k(b) remainder interest, it is irrelevant that the precise amount due cannot yet be quantified. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems." *Id.* at 300. The threshold constitutional proposition—that § 1396k(b) confers on Plaintiffs a vested property interest that § 1396b(d)(3) would extinguish by stealth according to some circuits—raises a sufficient constitutional problem to opt against reading § 1396b(d)(3)(ii) in a vacuum. And, more to the point, no such reading and no such interpretive entanglement is necessary, as the alternative construction pressed herein is more than "fairly possible."

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Antonio Ponvert III
Counsel of Record
Koskoff, Koskoff & Bieder, PC
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue, 5th Floor
Bridgeport, Connecticut 06604
(203) 336-4421

G. Kendrick Macdowell
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed January 28, 2002]

No. 01-1410

BLANCHE E. GREENLESS, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

LINCOLN C. ALMOND, in his capacity as Governor of the State of Rhode Island; CHRISTINE FERGUSON, in her capacity as Director of the Department of Human Services for the State of Rhode Island; SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Rhode Island

AFFIRMED

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:
Richard Cushing Donovan, Clerk

/s/_____
Deputy Chief Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed January 28, 2002]

No. 01-1410

BLANCHE E. GREENLESS, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

LINCOLN C. ALMOND, in his capacity as Governor of the State of Rhode Island; CHRISTINE L. FERGUSON, in her capacity as Director of the Department of Human Services for the State of Rhode Island; SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Rhode Island
Honorable Mary M. Lisi, Judge
Civil Action No. 00-037ML

Decided: February 26, 2001

AFFIRMED

Before JUSTICES LYNCH, Circuit Judge, COFFIN, Senior Circuit Judge, and YOUNG, District Judge.

JUSTICE LYNCH delivered the opinion of the Court.

JUDGE YOUNG, of the District of Massachusetts, sitting by designation.

This case concerns claims made on the allocation of monies to the states, specifically Rhode Island, from the 1998 Master Settlement Agreement in the tobacco litigation.

Blanche E. Greenless appeals the dismissal of her suit under 42 U.S.C. § 1983 for declaratory and injunctive relief against the Governor of Rhode Island and various other state officials, all in their official capacities. Greenless seeks to represent all of Rhode Island's Medicaid recipients who have suffered damages from the use of tobacco. She claims that federal law requires Rhode Island to pay that class a portion of the proceeds from the settlement of its claims against the tobacco industry, and that Rhode Island is wrongfully converting what are essentially Medicaid recovery collections.

The district court dismissed Greenless's suit without a hearing as barred by the doctrine of state sovereign immunity embodied in the Eleventh Amendment. We affirm the dismissal of the action, but on different grounds, holding that Greenless has failed to state a claim on which relief can be granted due to a recent amendment of the Medicaid statute. We do not reach the difficult question whether a claim of the sort Greenless asserts, if provided by federal law, would be barred by the Eleventh Amendment.

I.

A. Facts

During the 1990s, more than forty of the fifty states, including Rhode Island, filed suits against the major manufacturers of tobacco products. *See State v. Brown & Williamson Tobacco Corp.*, No. 97-3058 (R.I. Sup.Ct. Dec. 17, 1998) (consent decree and final judgment). The exact

theories of recovery varied from state to state. Generally, the states alleged that the tobacco industry had misled the public by concealing the risks of cigarette smoking and had therefore caused the states to spend vast sums of public money on providing health care for those made ill by tobacco. Unlike prior attempts to hold tobacco manufacturers liable for smoking-related illnesses or deaths, the states' suits resulted in a lucrative settlement, recorded by the Master Settlement Agreement. *See* National Association of Attorneys General, *Master Settlement Agreement, at* http://www.naag.org/tobac/cigmsa.rtf (Nov. 23, 1998). According to Greenless, under the Agreement Rhode Island will receive approximately $1.408 billion.[1]

The expenditures on health care on which the state's suits relied arose in significant part through the Medicaid program. The Medicare and Medicaid programs are the two largest sources of public funding for health care in the United States. Medicare, which provides health care primarily to the elderly and to some individuals with disabilities, receives funds exclusively from the federal government. Medicaid, which provides health care primarily to the indigent, receives funds from both the federal government and the states. State Medicaid expenditures consume large portions of states' budgets; in fiscal year 2000, Rhode Island spent 22.6% of its budget on Medicaid. Rhode Island Department of Human Services, *Annual Report: Fiscal Year 2000: Rhode Island Medicaid Program* 13, *available at* http://www.dhs.state.ri.us/dhs/reports/ma2000.pdf. When the states sought to recover funds spent on health care made necessary by smoking, some of their alleged damages were Medicaid expenditures. So stated Rhode Island's complaint at the time.

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[1] Payments under the Agreement are contingent on many factors, and assigning values to a state's right to payment is therefore difficult. *See Floyd v. Thompson*, 227 F.3d 1029, 1038 (7th Cir. 2000).

The recovery of Medicaid expenditures from the tobacco industry arguably brought into play certain aspects of the federal Medicaid statute. When a state agrees to participate in Medicaid by enacting a statute, it must create a plan that meets requirements specified by Congress. That state Medicaid plan must "provide that, as a condition of eligibility for medical assistance under the State plan ... the individual is required--(A) to assign the State any rights ... to payment for medical care from any third party." 42 U.S.C. § 1396k(a) (1994).

Moreover, when a state, acting on an individual's assignment of his or her rights, has recovered from a third party compensation for state expenditures to provide health care via Medicaid, the state may not necessarily keep all of the money. Instead,

> [s]uch part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), *and the remainder of such amount collected shall be paid to such individual.*

Id. § 1396k(b) (emphasis added).[2] After the state and federal governments are reimbursed, any excess is paid to the individual, "who is usually a person of limited resources." 45 Fed. Reg. 8982, 8983 (Feb. 11, 1980).

If these provisions apply to the Master Settlement Agreement (Rhode Island claims they do not because the suit was brought not as a § 1396k assignment but under different theories) then at least some of the money that the tobacco industry paid the states under the Agreement belongs to the federal government as appropriate reimbursement within the meaning of § 1396k(b). If, as well, the states received more money from the tobacco industry under the Agreement than was necessary to reimburse both the state and federal governments for medical assistance payments made on behalf of smokers, then the remainder belongs to the smokers on whose behalf those payments were made. Greenless's claim rests on this theory.

Congress has recently amended the statute. The 1999 Emergency Supplemental Appropriations Act exempts from the normal procedures by which the federal government takes its share of state recoveries "any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products ... and State Attorneys General." Pub.L. No. 106-31, § 106-31, § 3031, 113 Sta. 57, 103-04 (1999) (codified at 42 U.S.C. § 1396b(d)(3)(B)(i) (Supp. V 1999)). It furthermore provides, with an exception irrelevant to this case, that "a

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[2] This language is clarified by regulation:

> The agency must distribute collections as follows—
>
> (a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.
>
> (b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with [a related provision]....
>
> (c) To the recipient, any remaining amount....

42 C.F.R. § 433.153 (2000).

State may use amounts recovered or paid to the State as part of a comprehensive ... settlement ... described in [the prior] clause ... for any expenditures determined appropriate by the State." *Id.*, 113 Stat. at 104 (codified at 42 U.S.C. § 1396b(d)(3)(B)(ii)).

The parties agree that this new language removes any claim to the states' tobacco settlement money by the federal government. The question presented by this appeal is whether the language also removes any possible claim to that money under federal law by the individuals whose illnesses caused the states to spend the money.

B. History

Greenless filed this suit in the District of Rhode Island against the various defendants in their official capacities, claiming that Rhode Island must pay her and the members of her class the amount by which the tobacco settlement exceeds its actual costs. She alleged this amount to be substantial. For her cause of action she relied on 42 U.S.C. § 1983 and its broad-ranging remedies for violations of federal rights under color of state law. She asked for declaratory and injunctive relief to compel Rhode Island's officials to pay her the alleged excess.

The defendants moved to dismiss on two grounds. First, they argued that Greenless's suit is barred under the Eleventh Amendment by state sovereign immunity as a suit for, in effect, money damages against the treasury of a state. Second, they argued that Greenless has no cause of action under § 1983 because her rights under the Medicaid statute have not been and will not be violated. Greenless in response claimed that her suit does not run afoul of the Eleventh Amendment because the state is not a party, only state officials, and because she seeks only prospective relief permissible under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), as explained in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). She also responded to the defendants' statutory

arguments. On February 26, 2001, the district court dismissed the case in a seven-page opinion addressing only the question of state sovereign immunity. *Greenless v. Almond,* C.A. No. 00-037ML (D.R.I. Feb. 26, 2001). This appeal followed. The defendants make on appeal both sets of arguments presented to the district court in support of the judgment.

II.

Our review of the district court's judgment in this case is de novo. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997) (reviewing de novo a dismissal on Eleventh Amendment grounds); *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992) (same for failure to state a claim). As always, we may affirm a district court's judgment on any grounds supported by the record. *Doe v. Anrig*, 728 F.2d 30, 32 (1st Cir. 1984). Moreover, this circuit has held that federal courts need not answer questions of state sovereign immunity under the Eleventh Amendment before answering other, easier legal questions that would decide a case. *Parella v. Ret. B. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-57 (1st Cir. 1999) (declining to apply to cases involving the Eleventh Amendment the rule of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), in which "a majority of justices rejected the use of 'hypothetical jurisdiction'").

A. Eleventh Amendment and constitutional avoidance

Other plaintiffs have brought cases similar to this one against numerous other states. None have yet succeeded.[3] The only circuit courts[4] to address the Eleventh Amendment

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[3] Our discussion of similar cases in this opinion is not exhaustive and includes only those published opinions useful to give context to our decision today.

[4] Some district courts have decided, as the district court concluded in this case, that state sovereign immunity bars such claims. *E.g., Clark v. Stovall*, 158 F.Supp.2d 1215 (D.Kan.2001); *Cardenas v. Anzai*, 128 F.Supp.2d 704 (D.Haw.2001); *Martin v. New Mexico*,

question, the Fifth and Tenth Circuits, have held that the Amendment would not prevent the plaintiffs in a case such as this one from obtaining the relief they seek, if that relief were available under federal law. *Harris v. Owens*, 264 F.3d 1282, 1289-94 (10th Cir. 2001) (holding that the relief requested is permissible under the doctrine of *Ex parte Young*; *Watson v. Texas*, 261 F.3d 436, 440-43 (5th Cir. 2001) (holding that Texas waived its sovereign immunity in the settlement agreement).

Every court to consider the question has, however, decided that § 1396k(b) does not apply to the state tobacco settlements, either because the settlements are not recoveries of the sort governed by that section as a general matter or because § 1396b(d)(3)(B)(ii) specifically exempts the settlements. *See Tyler v. Douglas*, No. 00-7839, 2001 WL 1230630, --- F.3d ---- (2d Cir. Oct. 16, 2001) (relying on § 1396b(d)(3)(B)(ii)); *Harris*, 264 F.3d at 1294-97 (same); *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1259-62 (11th Cir. 2001) (relying on § 1396k(b));[5] *Floyd v. Thompson*, 227 F.3d 1029, 1035-38 (7th Cir. 2000) (relying on § 1396k(b) and on Wisconsin assignment law); *Skillings v. Illinois*, 121 F.Supp.2d 1235 (C.D.Ill. 2000) (following *Floyd* while applying Illinois law); *see also State v. Superior Court*, 83 Cal.App.4th 597, 99 Cal.Rptr.2d 735 (2000) (interpreting portion of state code implementing federal statutory scheme); *Brown v. State*, 617 N.W.2d 421, 425-27 (Minn.Ct.App. 2000) (same).

In summary, the courts that have considered questions of state sovereign immunity similar to those presented by this

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197 F.R.D. 694 (D.N.M. 2000); *Barton v. Summers*, 111 F.Supp.2d 989 (M.D.Tenn. 2000). The decision of the District of New Mexico in *Martin* preceded the Tenth Circuit's decision in *Harris*, discussed in text; *Harris* is now, of course, the law of that circuit.

5 Judge Noonan would have relied on § 1396b(d)(3)(B)(ii). *McClendon*, 261 F.3d at 1262 (Noonan, J., concurring in the judgment).

case have split, and the circuit courts among this group have held the Eleventh Amendment not to bar claims such as Greenless's. Those that have considered statutory questions similar to those here are so far unanimous, although different courts have followed different reasoning to the same conclusion.

We do not decide any question of state sovereign immunity today. We will, however, sketch the outlines of the question on the facts of this case in order to explain our reasons for avoiding it. As a general matter the several states are immune under the Eleventh Amendment from private suit in the federal courts, absent their consent.[6] Among the exceptions to this rule is the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which allows a plaintiff to enforce a claim of federal right by obtaining injunctive or declaratory relief against a state officer in the officer's official capacity. In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Supreme Court explained that the purpose of this exception is to prevent continuing violations of federal law, but not to remedy past violations. Therefore, an *Ex parte Young* plaintiff may obtain prospective, but not retrospective, relief. *See id.* at 664-65, 94 S.Ct. 1347; *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 294, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (O'Connor, J., concurring in part and concurring in the judgment) ("[A] *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective.*"); *id.* at 298, 117 S.Ct. 2028 (Souter, J., dissenting) (observing that, given the disposition of the Justices in that case, "Justice O'Connor's view is the controlling one").

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[6] States do not waive their Eleventh Amendment immunity merely by participating in the Medicaid program. *Fla. Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (per curiam).

Greenless claims to seek a prospective remedy for an allegedly ongoing violation of federal law that will recur each time the state actually receives an installment payment of the tobacco settlement. The defendants claim she seeks retrospective compensation for the alleged violation that the state committed when it reached agreement with the tobacco industry without providing that a portion of the proceeds would go to Greenless and her class. Because of the Supreme Court's recent reinvigoration of the doctrine of state sovereign immunity, *see, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), private plaintiffs' ability to enforce congressionally enacted restraints on the states' use of many types of funds may well turn on just such questions to a degree few readers of *Edelman* would have predicted when that case was decided.

It is not, however, the role of the federal courts to answer legal questions unless specific cases need answers. This principle applies with special force to complex questions of constitutional law, so that courts often avoid such questions by choosing to focus on other aspects of a case that adequately dispose of the controversy between the parties. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 495 (1st Cir. 2000) (avoiding a complex Eleventh Amendment question in favor of a simpler statutory subject matter jurisdiction question); *Parella*, 173 F.3d at 56. In this case, the constitutional question is difficult; but, as we discuss below, at least one statutory question is easy and disposes completely of Greenless's suit. We therefore bypass the constitutional question, as have the Second, Seventh, and

Eleventh Circuits, in favor of the easier question whether plaintiffs have stated a claim on which relief may be granted.[7] *See Tyler*, 2001 WL 1230630, at *4; *Floyd*, 227 F.3d at 1034; *McClendon*, 261 F.3d at 1258. We recommend this course to the district courts of this circuit as the wiser approach.

B. Statutory Interpretation

There are two reasons to doubt whether the amended Medicaid statute will support Greenless's claim. The first reason is that it is not clear whether any of the money recovered by Rhode Island is money to which Greenless and her class can stake a claim under § 1396k(b) as it stood at the time of the settlements. *See McClendon,* 261 F.3d at 1259-62; *Watson*, 261 F.3d at 443-45. The second reason, and the one on which we base our holding, is § 1396b(d)(3)(B)(ii), added by the Emergency Supplemental Appropriations Act

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[7] The Tenth Circuit in *Harris* reached the same conclusion about the relative difficulty of the questions but nevertheless held itself bound to answer the constitutional question because of its prior holding in *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999), that questions involving the Eleventh Amendment must be reached before all other legal issues in a case. *Harris*, 264 F.3d at 1288. The Fifth Circuit follows a similar rule. *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 285-88 (5th Cir. 1999). Under *Parella*, this circuit follows a different one. Several other circuits appear to agree, or at least to leave open some room for judicial discretion. *See Tyler*, 2001 WL 1230630, at *4, ---- (observing the Tenth Circuit's difficulty, and then deciding the statutory question); *McClendon*, 261 F.3d at 1258 (distinguishing *Seaborn v. Fla. Dep't of Corr.*, 143 F.3d 1405 (11th Cir. 1998), which had appeared to announce a holding similar to that of *Martin*, and reaching the statutory question); *United States ex rel. Long v. SCS Bus. & Technical Inst.*, 173 F.3d 890 (D.C.Cir. 1999) (holding that a federal court may reach other questions before an Eleventh Amendment question at least if the state involved consents, and observing the benefits of doing so when the Eleventh Amendment question is complex); *cf. Floyd*, 227 F.3d at 1035 (stating that the court would resolve the Eleventh Amendment issue first "if it appeared in any way possible" that the plaintiffs could sue the state, and then concluding that such a suit was not possible).

of 1999, Pub.L. No. 106-31, 113 Stat. 57, 103-04 (1999). We find persuasive the reasoning of *Tyler*, in which the Second Circuit held that § 1396b(d)(3)(B)(ii) was plain and foreclosed a suit similar to the present one. *Tyler*, 2001 WL 1230630, at *5-8, --- F.3d at ----. We agree with the Second Circuit that the funds described in that section as available "for any expenditures determined appropriate by the State" cannot simultaneously be owed to Medicaid recipients. *Id.* at *6, ---- (quoting § 1396b(d)(3)(B)(ii)).

Greenless makes two arguments against this reading of §1396b(d)(3)(B)(ii) based on traditional principles of statutory interpretation. First, she claims that the reading violates the presumption against implied repeal. Second, she claims that the reading violates the presumption against giving legislation retroactive effect. Although these two presumptions are well-known landmarks of this area of the law, neither applies to this case.

The "implied repeal" argument is an odd one because at issue is not whether Congress totally repealed § 1396k, but whether it intended to carve out tobacco settlement monies from the reach of that provision. But we will use Greenless's terminology. She argues that the amendment only waives the federal government's share of the settlement and does not affect any rights of individuals. Not so. The presumption against implied repeal, although of particular force when, as here, applied to appropriations riders, nevertheless turns on legislative intent. *United States v. Will*, 449 U.S. 200, 221-24, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980) ("[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that ... it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' " (quoting *United States. v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940)) (second and third alterations in *Will*)). Indeed, the presumption results from certain assumptions that courts make about the legislative process:

> Courts do not lightly assume that one statute has implicitly repealed another. This principle is a product of a set of beliefs about the legislative process--in particular, a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration another program that was likely the product of sustained attention.

C.R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L.Rev. 405, 475 (1989) (footnote omitted). These concerns have less force where, as here, Congress was responding to a recent event, the Master Settlement Agreement, and was clear in its language. The only even arguable doubt is whether that repeal covered Medicaid recipients' possible claims as well as the federal government's. In our view the plain statutory language means both.[8]

The presumption against retroactivity also does not affect the result in this case. It is true that as a general matter Congress must speak clearly to make its legislation retroactive. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).[9] Whatever the

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[8] Even were we to apply the presumption against implied repeal, that presumption can be overcome by an "irreconcilable conflict" between statutes. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)) (internal quotation marks omitted). It is impossible to reconcile § 1396k(b)'s requirement that "the remainder of [the tobacco settlement] shall be paid to such individual" with § 1396b(d)(3)(B)(ii)'s permission to use the money "for any expenditures determined appropriate by the State."

[9] We disregard the tension between Greenless's argument for Eleventh Amendment purposes that she seeks prospective relief for a future injury, rather than retrospective compensation for a past injury, and her argument that our reading of the statute renders it retroactive. *See Landgraf*, 511 U.S. at 273, 114 S.Ct. 1483 ("When the

proper characterization of the relief Greenless seeks in this case, Congress made its intent clear in the amendment, which "applies to all funds received under the Master Settlement Agreement, whether past, present, or future." *Harris*, 264 F.3d at 1296.

III.

To avoid the unnecessary resolution of a difficult constitutional question, we have assessed the merits of Greenless's case and have found that she has failed to state a claim upon which relief may be granted. Therefore, although we do not reach the reasoning of the district court's opinion, its judgment dismissing the case is *affirmed.*

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intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 00-037ML

BLANCHE E. GREENLESS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

LINCOLN C. ALMOND, in his capacity as Governor of the State of Rhode Island; CHRISTINE L. FERGUSON, in her capacity as Director of the Department of Human Services for the State of Rhode Island; SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island and JOHN DOE, in his capacity as designated escrow agent,

Defendant.

MEMORANDUM AND DECISION

This matter is before the Court on Defendants' Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Motion is granted.

I. Standard of Review

In reviewing a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), this Court "accept[s] well-pleaded facts as true and draw[s] all reasonable inferences from those facts in favor of the plaintiff." Figueroa v. Rivera, 147 F.3d 77, 80 (1st Cir. 1998). "Dismissal is appropriate 'only if it clearly appears, according to the facts alleged, that the plaintiff

cannot recover on any viable theory.'" Id. (quoting Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990)). With this framework in place, the Court turns to Plaintiff's Complaint and the parties' arguments.

II. Background

A. The underlying suit

This civil action arises from the settlement of the State of Rhode Island's law suit against several domestic tobacco companies and their trade associations ("the tobacco defendants"). See State of Rhode Island v. American Tobacco Co., et al., No. 97-3058 (R.I. Super. Ct. filed Nov. 7, 1997) ("the Rhode Island tobacco suit"). Former Rhode Island Attorney General Jeffrey B. Pine[1] filed a law suit on behalf of the State of Rhode Island as part of a nationwide effort by over forty attorneys general, who brought similar actions in their respective jurisdictions. The State of Rhode Island asserted statutory and common law claims against the tobacco defendants and sought a wide range of injunctive and monetary relief; however, it did not assert a subrogation claim on behalf of the Plaintiff or any other individual Medicaid recipient. See id.

On November 27, 1998, the parties to the Rhode Island tobacco suit filed a Master Settlement Agreement ("MSA") in Rhode Island Superior Court.[2] Under the terms of the MSA, the State of Rhode Island agreed to release its claims against the tobacco defendants in exchange for approximately $1.408 billion dollars to be paid in annual installments over twenty-five years. (Compl. ¶10.) The MSA did not release potential claims for "private or individual relief for separate and distinct injuries." (Defs'

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[1] Sheldon Whitehouse, who is named in this suit, has since succeeded Mr. Pine as Rhode Island Attorney General.

[2] Rhode Island was one of forty-six "settling states" to enter into the MSA, however, the instant action concerns only Rhode Island's share of proceeds pursuant to the MSA.

Ex. B. MSA §II (pp)(2).) On December 17, 1998, the Superior Court of Rhode Island entered a Consent Decree and Final Judgment incorporating the provisions of the MSA and dismissed the lawsuit.

B. The instant action

Plaintiff brings this action on behalf of herself and a putative class of Rhode Island citizens "who have received medical assistance through the State of Rhode Island's Medicaid program for tobacco-related diseases or injuries." (Compl. at 8, ¶ 27.) Although the Complaint is styled as a claim for declaratory and injunctive relief against certain officials of the State of Rhode Island, in essence Plaintiff seeks money damages from the state, i.e. a portion of Rhode Island's proceeds from the MSA.

Plaintiff claims that under 42 U.S.C. § 1396a(a)(45) and Rhode Island General Laws § 40-6-9, she and the putative class members assigned their right to recover medical care expenses to the state, and that under 42 U.S.C. § 1396a(a)25, Rhode Island was obligated to seek reimbursement in its litigation against the tobacco companies for all costs paid by the state medicaid program on their behalf. Further, Plaintiff claims that under 42 U.S.C. § 1396k(b) (which directs states to give individuals any funds collected from third parties for state Medicaid expenses in excess of the amount expended by the state), she and the putative class members are entitled to a portion of the money Rhode Island obtained through settlement with the tobacco companies. Therefore, Plaintiff claims that Defendants are in violation of federal Medicaid law for either failing to seek reimbursement (pursuant to § 42 U.S.C. 1396a(a)25), or for failing to distribute a portion of the settlement proceeds (pursuant to 42 U.S.C. § 1396k(b)). Plaintiff also claims that as a result of the settlement between the State of Rhode Island and the tobacco companies, she and the putative class members can no longer seek their own recovery because all of their potential claims were released.

In the Motion to Dismiss, Defendants argue (1) the Eleventh Amendment bars this suit in federal court because Plaintiff is in fact suing the State of Rhode Island for damages; and (2) Plaintiff fails to state a claim for which relief can be granted.

III. Analysis

Eleventh Amendment jurisprudence establishes that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." See Edelman v. Jordan, 415 U.S. 651, 663 (1974). However, courts have recognized three exceptions to a state's Eleventh Amendment immunity. The first occurs where Congress properly abrogates the immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44. The second arises where a defendant state explicitly waives its immunity by consenting to be sued in federal court. Id. The third and narrowest exception, known as the Ex parte Young exception, applies where a suit is limited to prospective injunctive relief against a state official to enjoin a continuing violation of federal law. Id.; Ex parte Young, 209 U.S. 123 (1908). In this case, Plaintiffs argue that the Ex parte Young exception applies.

Under Ex parte Young, the Eleventh Amendment does not bar suits by citizens against a state where the state is not "the real, substantial party in interest." See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984). A state is not considered a "substantial party in interest" where suit is brought against state officials seeking an injunction to conform their future official conduct to the Constitution or to federal law. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269-70 (1997). A suit brought against state officials is deemed to be a suit against the state itself when the plaintiff seeks damages for past harm which would be paid out of state funds. See Edelman, 415 U.S. at 666-67. Accordingly, in most cases in which the Ex parte Young exception has been held to apply, the primary relief ordered

by the court is an injunction requiring state officials to comply with the Constitution or with federal law. See e.g. Papasan v. Allain, 478 U.S. 265 (1986); Milliken v. Bradley, 433 U.S. 267 (1997); Edelman, 415 U.S. 651. Such prospective injunctive relief is not barred by the Eleventh Amendment even if it requires payment from a state treasury, as long as the effect on the state treasury is "ancillary." See Edelman, 415 U.S. at 668.

Plaintiff argues that the Ex parte Young exception applies in this case because she seeks "prospective injunctive relief" which would not extract a "single dime" from the state treasury. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 47.) Plaintiffs seek to enjoin the Defendants "to return to the Plaintiffs any and all property taken from them, including . . . that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations." (Comp. at 23, ¶ 4.) Plaintiff argues that this relief is not a claim for damages for past harm to be paid out of state-owned funds, because any resulting disbursements would derive from "the distribution of future settlement payments which are still in the possession of the tobacco company defendants." (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 47.)

Plaintiff's argument, though creative, is not compelling. Although Plaintiff attempts to skirt the Eleventh Amendment barricade by ostensibly seeking injunctive relief, Plaintiff is in effect seeking an order from this Court to intercept payments owed to the State of Rhode Island pursuant to the MSA, and to direct a portion of that money to be paid to Plaintiff and members of the putative class as compensation for past harm. However, the fact that Rhode Island agreed to receive its settlement proceeds in future installments is irrelevant; Rhode Island's rights to the proceeds were fixed when the MSA was filed on November 27, 1998, and the state has effectively owned that money from that date forward.

Accordingly, the Court finds that Plaintiff's claims against the State of Rhode Island are for money damages for past harm and that those money damages would be paid out of state-owned funds. This Court therefore concludes that the Eleventh Amendment bars this suit in federal court. See, e.g., Martin v. New Mexico, 197 F.R.D. 694 (D.N.M. 2000); Floyd v. Thompson, 111 F. Supp. 2d 1097 (W.D. Wis. 1999); aff'd on other grounds, 227 F.3d 1029 (7th Cir. 2000); Barton v. Summers, 111 F. Supp. 2d 989 (M.D. Tenn. 2000).

Since the Court finds that Plaintiff's claims are barred by the Eleventh Amendment, it need not address Defendants' argument to dismiss Plaintiff's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is granted.

SO ORDERED.

/s/_____

Mary M. Lisi
United States District Judge
February 26, 2001

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Civil Action No. 2000-0037ML

BLANCHE E. GREENLESS, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

LINCOLN C. ALMOND, in his capacity as Governor of the State of Rhode Island; CHRISTINE L. FERGUSON, in her capacity as Director of the Department of Human Services for the State of Rhode Island; SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island and JOHN DOE, in his capacity as designated escrow agent,

Defendants.

CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, BLANCHE E. GREENLESS, individually and on behalf of all others similarly situated, alleges as follows:

Nature of Lawsuit

1. This is an action brought by and on behalf of the State's citizens who have suffered death, smoking-related diseases and debilitation from tobacco use and who are and have been dependent upon the State's Medicaid program to help pay for their medical care.

2. As a condition of eligibility for government-subsidized medical treatment and related health care through the Rhode Island State Medicaid Program, Plaintiffs, Blanche E. Greenless, individually and on behalf of all other similarly situated, [hereinafter "Plaintiffs"] gave to the State of Rhode Island their rights to recover against parties responsible for their illnesses, subject to federal law which obligates states to pursue third parties who are responsible for these illnesses.

3. Federal law further obligates each State, upon recovering against responsible third parties, to keep the sum representing the State Medicaid costs, to remit to the federal government its Medicaid costs and thereafter to disburse to individuals such as Plaintiffs and all other similarly situated, the balance of any recovery.

4. The State of Rhode Island receives hundreds of millions of dollars in federal funds by virtue of its participation in the federal Medicaid program and its concomitant agreement to comply with the Medicaid Act and attendant federal regulations.

5. More specifically, the State of Rhode Island must comply with those provisions of the Medicaid Act mandating (a) the recovery of medical assistance payments from third parties who are responsible for causing Medicaid recipients' sickness, injury and death, and (b) the disbursement of a portion of funds collected form those responsible third parties to injured Medicaid recipients, such as the Plaintiffs.

6. The within case arises following the State of Rhode Island's successful law suit against manufacturers of tobacco products, State of Rhode Island v. America Tobacco Company, Inc., et al. C.A. No. 97-3058 filed by the State's Attorney General, Jeffrey B. Pine, in

Providence County Superior Court on June 17, 1997. In the course of that litigation, and in numerous pleadings filed with the State Court and in countless public pronouncements, various state officials, including Defendant Governor Lincoln C. Almond and Defendant Attorney General Sheldon Whitehouse have identified the tobacco-company defendants as third parties legally liable for causing Medicaid recipients in the State of Rhode Island sickness, injury and death.

7. Once the State of Rhode Island identified the tobacco companies as responsible third parties within the meaning of the Medicaid Act, federal law compelled the State to seek from those companies reimbursement of all monies paid by the State Medicaid program on behalf of persons injured by tobacco use. Indeed, in its response to pleadings filed by the tobacco defendants, for example, the State specifically acknowledged the compelling force of its Medicaid obligation by stating:

> In this action, the State of Rhode Island seeks reimbursement for health care expenses paid by the State for the treatment of Medicaid recipients who have suffered and died from smoking-related illnesses.

8. Moreover, the State's complaint against the defendant tobacco companies specifically acknowledged that "[t]o receive federal funding for Medicaid, the State must seek reimbursement from liable parties whenever possible" and further "the state has the right to an automatic assignment of medical support rights for Medicaid recipients" and hence "is entitle[d] to reimbursement from the defendants for the medical costs due to tobacco-related illnesses of Medicaid recipients." (citing 42 U.S.C. § 1396(a)(25)).

9. In addition to its Complaint, in numerous other pleadings, and in official statements made by State officials in the course of the State's lawsuit against tobacco companies, the State revealed that the core element of damages claimed by the State was the cost of medical payments made through the State's Medicaid program to pay for smoking-related injuries caused by the tobacco companies.

10. On December 17, 1998, an order entered documenting the State's settlement of its lawsuit with the defendant tobacco companies pursuant to a so-called Master Settlement Agreement, whereby the State of Rhode Island agreed to dismiss the suit and forever release and discharge the tobacco defendants in exchange for cash payments in an amount approximating the sum of $1.408 billion dollars, the bulk of which is to be paid to the State in annual installments over the next twenty-five (25) years. The State dismissed its lawsuit against the defendant tobacco companies on said date, the Master Settlement Agreement became final on said date, and the State has in fact already received its first installment payment of $17.7 million dollars on December 14, 1999.

11. Notwithstanding the fact that the State's lawsuit against the tobacco companies explicitly sought to recover monies paid through the State's Medicaid program, and indeed, in many instances, expressly acknowledges this as its primary objective, nevertheless, the State is taking no steps to disburse to the Plaintiffs any portion of the settlement amount or to inform the Plaintiffs of their rights to claim that portion of the settlement monies to which they are legally entitled pursuant to federal law.

12. If, as the State of Rhode Island through its officials claims, its suit against the tobacco companies was not a Medicaid recovery action, even in the face of its repeated acknowledgment that the tobacco companies are third parties responsible for Medicaid recipients' injuries and death, then the State has violated federal law by failing to bring an action for the recovery of medical payments from the tobacco companies as compelled by the Medicaid Act and its regulations.

13. Alternatively, if the State's lawsuit against the tobacco companies for the recovery of hundreds of millions of dollars in medical payments was, as it clearly appears, the recovery action compelled by the Medicaid Act, then the State of Rhode Island has in fact violated federal law by refusing to comply with those provisions of the Act that compel the State to disburse a portion of the settlement monies directly to the Plaintiffs.

14. Whether the State is violating the Medicaid Act by failing to seek the recovery of medical assistance payments from the tobacco companies, or it is violating the Medicaid Act by failing to distribute to the Plaintiffs or those similarly situated a part of the settlement monies, the State has unlawfully deprived and continues to deprive the Plaintiffs of their property in violation of federal law and the Fifth and Fourteenth Amendments to the United States Constitution.

15. Defendants' failure to comply with federal law not only deprives Plaintiffs of rights and property secured by federal law and the Constitution, but further threatens the State's entitlement to federal Medicaid funds, endangers the Plaintiffs' continued receipt of medical assistance benefits, and jeopardizes the health and well-being of tens of thousands of Rhode

Island's poorest citizens, including the Plaintiffs. The within Complaint for Declaratory and Injunctive Relief seeks to compel the State of Rhode Island and its officials to comply with their respective duties under federal law.

Jurisdiction and Venue

16. This action seeks injunctive and declaratory relief and is brought pursuant to 42 U.S.C. § 1983, and § 1988, and 28 U.S.C. § 2201 based upon Defendants' violation of Plaintiffs' protected rights under federal constitutional and statutory law. As this action seeks redress for the deprivation of rights secured by the United States Constitution and federal statutes and regulations, this Court has jurisdiction of the subject matter pursuant to 28 U.S.C. §§ 1331 and 1343.

17. A substantial part of the events giving rise to the causes of action stated herein occurred within the State of Rhode Island. Therefore, venue is proper in this Court under 28 U.S.C. § 1391(b)(2).

18. This action is brought as a class action under Rule 23 of the Federal Rules of Civil Procedure.

Parties

19. Plaintiff Blanche E. Greenless is an adult residing at 355 Hardig Road, Warwick, Rhode Island 02886. Mrs. Greenless is 84 years old, suffers from heart disease, emphysema, and cancer, and has been a recipient of medical assistance benefits for one or more of those conditions through Rhode Island's Medicaid program for at least ten (10) years.

20. At various times through the present, Plaintiff named above has received treatment for a smoking-related illness and ailments. Such treatment was paid for in whole or in part under the Rhode Island Public Assistance Act, Medicaid Program.

21. Defendant Lincoln C. Almond is the Governor of the State of Rhode Island. Defendant Lincoln C. Almond is sued in his official capacity as the Governor for the State of Rhode Island.

22. Defendant Sheldon Whitehouse is the Attorney General of the State of Rhode Island, who was responsible for prosecuting and settling the tobacco litigation on behalf of the State[1]. Defendant Sheldon Whitehouse is sued in his official capacity as the Attorney General for the State of Rhode Island.

23. Defendant Christine L. Ferguson is the Director of the Rhode Island Department of Human Services and is responsible for establishing policies and practices of the Department, and for implementing those policies and practices, including policies and practices for the recovery and disbursement of money paid through the State of Rhode Island's Medicaid program. Defendant Christine L. Ferguson is sued in her official capacity as the Director of the Rhode Island Department of Human Services.

24. Defendant John Doe, serves as the designated escrow agent for the funds to be paid pursuant to the tobacco litigation Master Settlement Agreement. Defendant, John Doe is sued in his official capacity as the designated escrow agent.

25. At all times relevant to this Complaint, Defendants Lincoln C. Almond, Sheldon Whitehouse, Christine L. Ferguson and John Doe were acting under the color of law.

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[1] Defendant Sheldon Whitehouse is the current Attorney General of the State of Rhode Island. Jeffrey B. Pine was the Attorney General of the State of Rhode Island at the time of the filing of the State's underlying action against the tobacco companies.

Class Action Allegations

26. This action is maintainable as a class action under Federal Rule of Civil Procedure 23, paragraphs (a), (b)(1)(A) and (b)(2).

27. Plaintiff Blanche E. Greenless brings this action on behalf of herself and all other persons who have received medical assistance through the State of Rhode Island's Medicaid program for tobacco-related diseases or injuries.

28. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claim of the named Plaintiff is typical of the claims of the class; and the named Plaintiff will fairly and adequately represent the interests of the class.

29. The prosecution of separate actions by individual members of the class would create the risk of inconsistent adjudications, which would establish incompatible standards of conduct for defendants.

30. Plaintiff and her counsel do not anticipate any difficulty in the management of this action as a class action.

31. The prosecution of separate actions by individual members of the class would:

(a) create a risk of inconsistent and varying adjudications for individual class members;

(b) As a practical matter, be dispositive on the other members not parties to the adjudication or would substantially impair or impede their ability to protect their individual interests; and

(c) Encumber or disallow obtaining the benefit for all class members the definitive determination of public policy issues of great public importance.

32. Furthermore, Defendants have acted, or refused to act, on grounds generally applicable to the class. Therefore, final declaratory and injunctive relief is appropriate to the class as a whole.

33. A class action is superior to other available means for the fair and efficient prosecution of this action.

34. Certification of a class will allow litigation of claims that, in view of the expense of litigation, may be insufficient in amount to support individual actions.

The Medicaid Program

35. Medicaid is a federal program of medical assistance to eligible low-income persons administered by the states under a cooperative federal-state funding program. Although states are not required to participate in Medicaid, if a state chooses to do so it must conform to federal Medicaid law.

36. Rhode Island participates in the Medicaid program. Rhode Island's program of medical assistance to low-income persons is codified at Rhode Island General Laws §§ 40-6-1 et seq.

37. In order to participate in the Medicaid program, and as a condition for the receipt of federal funds, Rhode Island was required to submit to the United States Department of Health and Human Services, Health Care Financing Administration (HCFA), a comprehensive written statement called a State Plan describing the nature and scope of its Medicaid program and giving assurance that the program will be administered in conformity with the requirements of the Medicaid Act and all applicable federal regulations.

38. Rhode Island's current State Plan was submitted to HCFA on behalf of the State of Rhode Island by the State's Department of Human Services. HCFA has

approved the State Plan, and the State has received hundreds and hundreds of millions of dollars in federal Medicaid funds in exchange for the State's commitment to abide by the Plan and to administer its program in compliance with federal law.

Medicaid Third-Party Recovery and Disbursement Requirements

39. The Medicaid Act, at 42 U.S.C. § 1396a(25)(A) and (B), requires each state in its State Plan to agree (a) "to take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services under the plan," and (b) "in any case where legal liability is found to exist after medical assistance ahs been made available ... [t]o seek reimbursement for such assistance to the extent of such legal liability."

40. The Act's implementing regulations, at 42 C.F.R. § 433.138(a), provide that the state "must take reasonable measures to determine the legal liability of third parties who are liable to pay for services furnished under the plan."

41. To effectuate recovery from responsible third parties, 42 U.S.C. § 1396a(45) requires that each State Plan must "provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients."

42. In Rhode Island, Medicaid recipients are deemed to have made an automatic assignment to the State "by the act of ... receiving medical assistance" through the state Medicaid program. Rhode Island General Laws § 40-6-9.

43. The Medicaid Act and its regulations also set forth specific mandatory rules governing the state's

disbursement of amounts recovered from responsible third parties.

44. Title 42 U.S.C. § 1396k provides that "[s]uch part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual."

45. Title 42 Code of Federal Regulations § 433.154 similarly mandates that the state "must distribute" to the individual Medicaid recipients all amounts recovered from responsible third parties in excess of what is required to reimburse the state and federal Medicaid programs for medical payments made on behalf of those recipients.

46. As explained by HCFA in its official commentary published in the Federal Register at the time that § 433.154 was codified, the Medicaid Act "specifically requires that any overage be paid to the individual, who is usually a person of limited resources." This federally-mandated distribution requirement ensures that both the state and federal government are made whole, with the balance of any recovery going to the injured party.

47. Federal regulations, at 42 C.F.R. § 433.151, require that Rhode Island's State Plan "must provide that the requirements ... for distributing third party collections specified in [section] 433.154 are met."

48. In its State Plan, the State of Rhode Island promises HCFA that it meets all requirements of 42 C.F.R. § 433.154.

49. If Rhode Island fails to comply with the third-party recovery provisions of the Medicaid Act, it will lose its entitlement to federal Medicaid funds (42 C.F.R. § 433.140(a)(1)), thereby endangering all Medicaid recipients' continued receipt of medical assistance benefits and jeopardizing the health and well-being of tens of thousands of Rhode Island's poorest citizens, including the Plaintiffs.

The State's Failure to Comply with Federal Law

50. The Defendants know and for some time have known that manufacturers of tobacco products and certain other tobacco-related organizations are third parties legally liable, within the meaning of the Medicaid Act, for medical assistance payments made through the Rhode Island Medicaid program.

51. This knowledge led the state to commence a lawsuit on June 17, 1997 against eleven manufacturers of tobacco products and other tobacco industry Defendants, asserting that the Defendants' misconduct injured the State by increasing the costs of health care benefits paid by the State through its Medicaid program.

52. The State's Complaint alleged, among other things, that: "[t]he diseases related to and caused by the smoking of cigarettes have killed millions of Americans over the last several decades ... [a]nd as a direct result, Rhode Island citizens have contracted smoking-related diseases including, without limitation, cancer, emphysema, lung and heart disease." The care and treatment of these Rhode Island citizens has placed a significant financial burden on the State. "This burden on all Rhode

Island citizens and the State should rightfully be borne by the tobacco manufacturers and their allied interests."

53. In its Complaint, the State acknowledged its receipt of federal funding for Medicaid, as well as a concomitant obligation to seek reimbursement from liable parties whenever possible pursuant to 42 U.S.C. § 1396a(a)(25). While the State asserted various counts against the tobacco Defendants, the consistent central element of actual damages was the reimbursement from the tobacco Defendants for the medical costs borne by the State of Rhode Island due to tobacco-related illnesses of the State's Medicaid recipients.

54. Accordingly, in its Complaint, the State sought "reimbursement from the Defendants for the medical costs due to tobacco-related illnesses of Medicaid recipients."

55. Pursuant to the specific terms of the Master Settlement Agreement and Rhode Island's release of the tobacco companies, Rhode Island has forever waived its right to litigate any theories of Medicaid recovery against the tobacco companies or to seek from the tobacco companies any reimbursement of Medicaid payments made on behalf of injured smokers, as assignee of the Plaintiff's claims or otherwise.

56. The parties to the Master Settlement Agreement, including Defendant, Attorney General Pine, took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though Rhode Island's Complaint explicitly sought to recover medical expenditures, and even though distribution of the settlement proceeds under the Master Settlement Agreement mirrors each state's

proportionate share of tobacco-related Medicaid expenditures. It has been admitted by various state governors and by the National Governors Association, for examples, that "[o]ur states' Attorneys General carefully crafted the tobacco agreement to reflect only state costs."

57. The states, were motivated to "carefully craft" the Master Settlement Agreement in this way so that they could attempt to avoid their legal obligations to disburse a portion of the recovery to the federal government, as required by the Medicaid Act.

58. It is a matter of public record, for example, that one of the "top priorities" of the National Governor's Association was to "develop a strategy aimed at preventing the federal government's seizure of state tobacco settlement funds," and that the states, including Rhode Island, were extremely concerned about "the amount that could be lost because of HCFA recoupment of federal Medicaid expenditures."

59. In May, 1999, as a result of the state's lobbying efforts to avoid paying any of the tobacco settlement monies to HCFA, Congress amended the Medicaid Act, 42 U.S.C. § 1396b(d), to add language waiving the federal government's entitlement to its portion fo the settlement proceeds. This legislation was described by the national Governor's Association as the Governor's "number one legislative priority."

60. The amendment to section 1396b(d), however, does not alter the State's legal obligation to disburse to the Plaintiffs that portion of the settlement monies that exceeds the State's Medicaid costs. Congress did not alter or amend any section of the Medicaid Act affecting the State's disbursement obligation to Medicaid recipients.

61. The $1.408 billion that Rhode Island is poised to receive from the tobacco companies exceeds even the most generous estimates of what the State has actually paid, or might in the future pay, on behalf of Medicaid recipients in this State who have suffered smoking-related injuries.

62. This excess recovery belongs to the Plaintiffs, and it must be disbursed to them.

First Claim for Relief

(Declaratory Judgment, 28 U.S.C. § 2201)

63. Plaintiffs re-allege and incorporate herein by reference each and every allegation of paragraphs 1 through 62.

64. There is an actual controversy between the parties. Plaintiffs contend that the Defendants have failed to comply with the third-party recovery provisions of the Medicaid Act and regulations, including those provisions that govern the disbursement of recovered funds to the Plaintiffs. Defendants contend that they have complied with federal law.

65. Plaintiffs, and all members of the plaintiff class, have suffered, are continuing to suffer, and are threatened with suffering irreparable injury.

66. Plaintiffs, and all members of the plaintiff class, have no adequate remedy at law to redress the violations of law alleged herein.

67. The Plaintiffs are entitled to a declaration of their rights and the Defendants' obligations with respect to the integrity of Rhode Island's Medicaid program insofar as the Defendants' failure to comply with federal law imperils its continued receipt of federal funds and endangers the public assistance program upon which Plaintiffs rely to maintain their health and well-being.

68. The Plaintiffs are also entitled to a declaration of their rights and the Defendants' obligations with respect to the provisions of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and the proper disbursement of amounts recovered.

Second Claim for Relief

(Deprivation of Property without Due Process)

69. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 68.

70. The Defendants have deprived Plaintiffs of their property without notice, hearing, and other due process required by the Fourteenth Amendment to the United States Constitution.

71. Among other things, the Defendants have deprived Plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the Plaintiffs' property interest in their claims – or causes of action – for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations, and (c) the value of the rights assigned by the Plaintiffs to the state as a condition of Medicaid eligibility, which value includes, but is not limited to, all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

Third Claim for Relief

(Taking of Property Without Just Compensation)

72. Plaintiffs incorporate all allegations of paragraphs 1 through 71 as fully set forth in this Count.

73. The Defendants have taken the Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth amendments to the United States Constitution.

74. Among other things, the Defendants have deprived Plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the Plaintiffs' property interest in their claims – or causes of action – for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the Medicaid Act and federal regulations, and (c) the value of the rights assigned by the Plaintiffs to the state as a condition of Medicaid eligibility, which value includes, but is not limited to, all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

75. The Defendants' decision to take Plaintiffs' property – expressed in, among other things, the tobacco litigation Master Settlement Agreement and public statements made by Rhode Island state officials – is a final decision.

76. The Master Settlement Agreement having become final, and the state's tobacco lawsuit having been dismissed with prejudice, no available state procedures or adequate state process exist for the Plaintiffs to seek just compensation.

Fourth Claim for Relief

(Violation of the Medicaid Act's Disbursement Requirements)

77. Plaintiffs re-allege and incorporate herein by reference all allegations of Paragraph 1 through 76 as if fully set forth in this Count.

78. The Defendants have violated and are violating federal law by failing to disburse properly funds that the State has recovered from legally responsible tobacco companies, as compelled by the Medicaid Act and governing federal regulations.

Fifth Claim for Relief

(Violation of the Medicaid Act's Recovery Requirements)

79. Plaintiffs re-allege and incorporate herein by reference each and every allegation of paragraphs 1 through 78.

80. To the extent Defendants claim that Rhode Island's lawsuit against the tobacco companies was not a Medicaid recovery action as compelled by the Medicaid Act, the Defendants have violated and are violating federal law by failing to seek reimbursement of medical assistance payments made through the state Medicaid program from known legally responsible tobacco companies, pursuant to the requirements of the Medicaid Act and governing federal regulations.

Prayer for Relief

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For an order certifying the class;
2. For an order declaring the Defendants are compelled by the Medicaid Act and federal regulations: (a) to seek reimbursement of medical assistance payments made through the state Medicaid program from known legally liable third-parties such as those tobacco companies already identified by the State; and (b) to disburse all amounts recovered in such third-party reimbursement actions according to the requirements of the Medicaid Act;
3. For temporary, preliminary and permanent injunctions enjoining the Defendants, their

successors, agents, employees, and all persons working in concert or participation with them, to disburse to the Plaintiffs, or to cause the disbursement to the Plaintiffs, of that portion of the tobacco litigation settlement proceeds that belong to the Plaintiffs, before such proceeds are deposited in the State treasury or are otherwise in the possession, custody or control of the State;

4. For temporary, preliminary and permanent injunctions enjoining the Defendants, their successors, agents, employees, and all persons working in concert or participation with them, to return to the Plaintiffs any and all property taken from them, including, but not limited to: (a) that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the Plaintiffs' property interest in their claims – or causes of action – for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; and (c) the value of the rights assigned by the Plaintiffs to the State, as a condition of Medicaid eligibility, to the full value of all amounts recovered by the State in excess of its tobacco-related Medicaid expenditures by virtue of such assignments, or to provide just compensation to the Plaintiffs to the full value of the property taken;

5. For temporary, preliminary and permanent injunctions enjoining the Defendants, their successors, agents, employees, and all persons working in concert in participation with them, to provide to each and every member of the Plaintiffs class due process of law concerning any and all property previously taken from the Plaintiffs,

including, but not limited to, (a) notice, (b) information and documents sufficient to apprise each Plaintiffs of the total amount expended by the State Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the State on that individual's behalf; and (c) a post-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

6. For temporary, preliminary and permanent injunctions enjoining the Defendants, their successors, agents, employees, and all persons working in concert or participation with them, to provide to each and every member of the Plaintiffs' class due process of law concerning any and all property to be taken from the Plaintiffs in the future, including (a) notice, (b) information and documents sufficient to apprise each member of the Plaintiffs' class of the total amount expended by the State Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the State on that individual's behalf; and (c) a pre-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation and to seek just compensation and other redress.

7. For temporary, preliminary and permanent injunctions enjoining Defendants, their successors, agents, employees, and all other persons working in concert or participation with them, to take all steps necessary to maintain all monies previously collected and all monies to be collected as a result of the States' settlement with tobacco companies, so that those settlement monies are not deposited in the state

treasury and will be available for proper accounting and disbursement according to the requirements of the Medicaid Act, other federal laws, the Constitution of the United States, and any and all orders of this Court;

8. For temporary, preliminary and permanent injunctions enjoining Defendants, their successors, agents, employees and all persons working in concert or participation with them, to take all steps necessary to retain all amounts collected by the State as a result of its settlement with the tobacco companies, and to notify each and every member of the Plaintiffs' class of the State law procedures whereby the Plaintiffs may obtain their federally mandated portion of the amounts recovered;

9. For temporary, preliminary and permanent injunctions enjoining Defendants, their successors, agents, employees and all persons working in concert or participation with them, to seek reimbursement of medical assistance payments made through the State Medicaid program from tobacco companies and other known legally liable third-parties according to the requirements of the Medicaid Act.

10. For costs and reasonable attorneys fees pursuant to 42 U.S.C. § 1998; and

11. For such other and further relief as this court deems just and proper.

PLAINTIFFS,
By their attorneys,

/s/_____
Michael A. St. Pierre, Esq. (2553)
Revens, Lanni, Revens & St. Pierre
946 Centerville Road
Warwick, RI 02886
(401) 822-2900 (Telephone)
(401) 826-3245 (Facsimile)

/s/_____
Richard A. Bieder, Esq.
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421
(203) 368-3244 (Facsimile)

Dated this 26th day of January, 2000.

APPENDIX E

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except

for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

42 U.S.C. § 1396k

§ 1396k. - Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall –

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required –

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1396a(l)(1)(A) of this title or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into

consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 654(3) of this title) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 U.S.C. § 1396b(d)

§ 1396b. Payments to States

(d) Estimates of State entitlement; installments; adjustments to reflect overpayments of underpayments; time for recovery or adjustment; uncollectable or discharged debts; obligated appropriations; disputed claims

(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsections (a) and (b) of this section for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsections, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2)(A) The Secretary shall then pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(B) Expenditures for which payments were made to the State under subsection (a) of this section shall be treated as an overpayment to the extent that the State or local agency administering such plan has been reimbursed for such expenditures by a third party

pursuant to the provisions of its plan in compliance with section 1396a(a)(25) of this title.

(C) For purposes of this subsection, when an overpayment is discovered, which was made by a State to a person or other entity, the State shall have a period of 60 days in which to recover or attempt to recover such overpayment before adjustment is made in the Federal payment to such State on account of such overpayment. Except as otherwise provided in subparagraph (D), the adjustment in the Federal payment shall be made at the end of the 60 days, whether or not recovery was made.

(D) In any case where the State is unable to recover a debt which represents an overpayment (or any portion thereof) made to a person or other entity on account of such debt having been discharged in bankruptcy or otherwise being uncollectable, no adjustment shall be made in the Federal payment to such State on account of such overpayment (or portion thereof).

(3)(A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of the Internal Revenue Code of 1986, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation

initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19) of this section, a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

(4) Upon the making of any estimate by the Secretary under this subsection, any appropriations available for payments under this section shall be deemed obligated.

(5) In any case in which the Secretary estimates that there has been an overpayment under this section to a State on the basis of a claim by such State that has been disallowed by the Secretary under section 1316(d) of this title, and such State disputes such disallowance, the amount of the Federal payment in controversy shall, at the option of the State, be retained by such State or recovered by the Secretary pending a final determination with respect to such payment amount. If such final determination is to the effect that any amount was properly disallowed, and the State chose to retain payment of the amount in controversy, the Secretary shall offset, from any subsequent payments made to such State under this subchapter, an amount equal to the proper amount of the disallowance plus interest on such amount disallowed for the period beginning on the date such amount was disallowed and ending on the date of such final determination at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period.

(6)(A) Each State (as defined in subsection (w)(7)(D) of this section) shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to –

(i) provider-related donations made to the State or units of local government during such fiscal year, and

(ii) health care related taxes collected by the State or such units during such fiscal year.

(B) Each State shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to the total amount of payment adjustments made, and the amount of payment adjustments made to individual providers (by provider), under section 1396r-4(c) of this title during such fiscal year.

42 U.S.C. § 1983

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 C.F.R. § 433.154

Title 42 – Public Health
Chapter IV – Centers for Medicare & Medicaid Services, Department of Health and Human Services

Part 433 – State Fiscal Administration
Subpart D – Third Party Liability

Sec. 433.154. Distribution of collections.

The agency must distribute collections as follows—

(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.

(b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with Sec. 433.153.

(c) To the recipient, any remaining amount. This amount must be treated as income or resources under part 435 or part 436 of this subchapter, as appropriate.

Supreme Court, U.S.
JUN 10 2002
CLERK

No. 01-1635

In The
Supreme Court of the United States

BLANCHE GREENLESS,

Petitioner,

v.

LINCOLN C. ALMOND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHELDON WHITEHOUSE
Attorney General
*NEIL F. X. KELLY
Special Assistant
Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400 Ext. 2284

*(*Counsel of Record*)

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pg

QUESTION PRESENTED

Rhode Island, along with the other states, pursued direct claims in civil actions in the various state courts against tobacco manufacturers as part of a nationwide effort for the vast harm caused to the states themselves. Rhode Island, the tobacco manufacturers, and forty-six other states settled that lawsuit and executed a contractually binding Master Settlement Agreement ("MSA") in November of 1998. Rhode Island agreed to receive its monetary settlement in the future along with a wide variety of relief. Congress, in reaction to the historic settlement, enacted 42 U.S.C. § 1396b(d)(3)(B) and exempted the states' settlement with the tobacco manufacturers from federal Medicaid recoupment provisions. Thus, the question presented is whether the First Circuit in the case of *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002) properly determined the plain language of 42 U.S.C. § 1396b(d)(3)(B)(ii) entitled the State of Rhode Island to utilize its recovery "for any expenditures deemed appropriate by the State." *Id.*

PARTIES

Jane Hayward succeeded Christine L. Ferguson as the Director of the Department of Human Services for the State of Rhode Island. Hayward is therefore automatically substituted as a party pursuant to Supreme Court Rule 35(3). Respondents are now Lincoln C. Almond, in his official capacity as Governor for the State of Rhode Island, Jane Hayward, in her official capacity as Director of the Department of Human Services for the State of Rhode Island, and Sheldon Whitehouse, in his capacity as Attorney General for the State of Rhode Island. (Collectively "the State").

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STATEMENT OF THE CASE

A. Rhode Island's Tobacco Suit

This claim arises out of the significant lawsuit between the tobacco manufacturers and the states. Rhode Island pursued a recovery for both past and future damages, and for the direct medical expenditures incurred only by the state itself. No other party or individual was a plaintiff in that action except the State of Rhode Island. Rhode Island was the only Plaintiff to its suit against the tobacco manufacturers on direct statutory and common law claims. The State's Amended Complaint did not contain a segregation claim on behalf of any individual or any single Medicaid recipient, but rather was based on the harm to the general public.

B. The Master Settlement Agreement

The MSA is a comprehensive global settlement of all the states' claims against the tobacco manufacturers. *See Greenless*, 277 F.3d at 603, *citing* National Association of Attorneys General, *Master Settlement Agreement* at http://www.naag.org/tobac/cgimsa.rtf (Nov. 23, 1998). Attorney General Jeffrey B. Pine executed Rhode Island's MSA on November 23, 1998. The MSA identifies the releasing parties as the State of Rhode Island and the tobacco manufacturers. *See* MSA §§ II (pp.) at 12, and (qq.) at 12.[1] Under the MSA, the claims of any "private or

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[1] The MSA § II (pp.) at 12, states "The Releasing Parties includes the State and its agents and officers, its political subdivisions and "(2) persons or entities acting in parents patraie, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in the settlement, (A) to the extent any person or entity is seeking relief on behalf of or

(Continued on following page)

individual" for any "relief for separate and distinct injuries" was specifically left open. MSA (pp.) at 12. In addition, the tobacco manufacturers did not admit or concede any liability or wrongdoing whatsoever in the MSA. The State of Rhode Island, through its MSA, is the only intended beneficiary of its settlement with the tobacco manufacturers.

C. The Congressional Response

Subsequent to the execution of the MSA legislation was introduced and passed by Congress that recognized the states' recovery was not subject to the Federal Medicaid recoupment provisions. Congress enacted 42 U.S.C. § 1396b(d)(3)(B) which provides:

> (i) Subparagraph (A) and paragraph (2)(B) [referring to the Medicaid recovery provisions of 42 U.S.C. § 1396a(a)(25)] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorneys General, or as party of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual

---

generally applicable to the general public in such Settling State or the people of the State, ***as opposed solely to private or individual relief for separate and distinct injuries."*** (emphasis added)

> settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

This amendment became effective on May 21, 1999.

D. Petitioner's Complaint

Petitioner claims that since the state recovered state tax dollars expended on the Medicaid program from the tobacco manufacturers that the tobacco suit was therefore a "recovery action compelled by the Medicaid Act under 25 U.S.C. § 1396a(a)(25)." Petitioner contended that the failure by the State to disperse any alleged excess to her from the tobacco settlement pursuant to 42 U.S.C. § 1396k(b) that the state has violated her property rights under Federal law and the Fifth and Fourteenth Amendments to the United States Constitution.

E. The First Circuit Decision

The First Circuit properly addressed the issue under the language of 42 U.S.C. § 1396b(d)(3)(B)(i) that removed any possible claim to the money under federal law by the individuals whose illness caused the states to spend "their tax dollars." *Greenless,* 277 F.3d at 605. The First Circuit found that "[e]very court to consider the question has, however, decided that § 1396k(b) does not apply to the state tobacco settlements, either because the settlements are not recoveries of the sort governed by that section as a general matter or because § 1396b(d)(3)(B)(ii) specifically exempts the settlement." *See Greenless,* 277 F.3d at 606 (citations listing decision and basis omitted). The First Circuit reasoned that when Congress determined the states could use their settlements for "'any expenditures

deemed appropriate by the State cannot simultaneously be owed to Medicaid recipients.'" *Greenless*, 277 F.3d at 608, *citing Tyler v. Douglas*, 280 F.3d 116, 122 (2nd Cir. 2001) (*quoting* 42 U.S.C. § 1396b(d)(3)(B)(ii)).

SUMMARY OF ARGUMENT

There is no reason, compelling or otherwise, for this Court to grant Petitioner's Writ of Certiorari. This Petition presents a simple matter of statutory construction and the plain language of 42 U.S.C. § 1396b(d)(3)(B). *Greenless*, 277 F.3d 608-609. The Circuit Courts of Appeal that have considered this matter have denied the appeals.[2] The statute at issue here deals with a one-time settlement of the states' claims against the tobacco manufacturers. Those lawsuits were based on the states' direct claims against tobacco. Congress recognized the tobacco suit as such a direct action, and amended the Medicaid statute to exempt the states' settlement from it. Moreover, Petitioner cannot maintain her claim under § 1396k(b) since it does not apply. Further review of this case is unnecessary.

[2] *See Harris v. Owens*, 264 F.3d 1282, 1294-97 (10th Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *McClendon v. Georgia Department of Community Health*, 261 F.3d 1252, 1259-62 (11th Cir. 2001) (relying on 1396K(b)); *Strawser v. Lawton*, 126 F. Supp.2d 994, 1003 n.6 (S.D. W.V. 2001), *appeal docketed*, No. 01-1175 (4th Cir. Feb. 9, 2001) (relying on § 1396b(d)(3)(B)(ii)). *Floyd v. Thompson*, 277 F.3d 1029, 1035-38 (7th Cir. 2000) (relying on 1396k(b) and Wisconsin assignment law).

ARGUMENT

1. There Is No Compelling Reason To Grant Review Of This Case

The issue presented here, as Petitioner concedes, is a matter of statutory interpretation of one specific statute that deals with the settlement of one lawsuit by the states against the tobacco manufacturers. It does not implicate the entire Medicaid statute. Petitioner is seeking further clarification of a decision that has already been properly answered several times. Indeed, these other courts have also determined that the plain statutory language of 42 U.S.C. § 1396b(d)(3)(B)(ii) forecloses Petitioner's claims.[3] Accordingly, there is no overriding issue of federal concern worthy of this Court's attention.

Although other federal circuits have denied Petitioner's claim on different grounds, none of them have found that Petitioner somehow has a property interest in the states' tobacco settlement. There is no split of the circuit courts as to the result. The First Circuit also doubted Petitioner's claim since it was "not clear whether any of the money recovered by Rhode Island is money to which Greenless and her class can stake a claim under § 1396k(b) as it stood at the time of the settlements." *Greenless*, 277 F.3d at 608, *citing McClendon*, 261 F.3d at 1259-62.

In addition, Rhode Island maintains that Petitioner could not satisfy the requirements of 42 U.S.C. § 1396k(b). First, the tobacco suit was not a subrogation claim or

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[3] *Harris v. Owens*, 264 F.3d 1282, 1294-97 (10th Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *Strawser* (relying on § 1396 b(d)(3)(B)(ii)).

based on an assignment. Second, there has been no finding of liability for the Petitioner by tobacco as required by 42 U.S.C. § 1396a(a)(25)(B) to engage the Medicaid recoupment provisions. Third, Petitioner does not have the required order under § 1396k to permit a recovery against the state. *See Calif. v. Superior Court*, 99 Cal. Rptr. 2d 735, 741 n.9 (Cal. Ct. App. 2000). The statute, § 1396k, applies where "Medicaid expenses are incurred for a minor Medicaid beneficiary. . . . It provides for reimbursement of any 'excess' to the beneficiary because it addresses a situation where the non-custodial parent might be ordered to pay for more than the child's medical expenses." *Id.*, *citing Perry v. Dowling*, 95 F.3d 231, 237-38 (2nd Cir. 1996) (construing § 1396k in its entirety). The State of Rhode Island was the only Plaintiff to the State's tobacco settlement. There were no individual's rights affected by the judgment or the MSA. Thus, Petitioner is unable to maintain any claim to any states' portion of the tobacco settlement.[4]

[4] The State also maintains that the Eleventh Amendment to the United States Constitution bars any recovery here as well. The First Circuit avoided this constitutional issue by disposing of the case on Constitutional grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

State Of Rhode Island

SHELDON WHITEHOUSE
Attorney General

NEIL F. X. KELLY
Special Assistant
Attorney General
150 South Main Street
Providence, RI 02903
Tel.: (401) 274-4400 Ext. 2284
Fax: (401) 222-2995